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JAMES H. McKENNEY,
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IN SUPREME COURT

UNITED STATES OF AMERICA.

OCTOBER TERM, 1892.

CASE NO. 1491.

CLYDE MATTOX, Plaintiff in Error.

vs.

UNITED STATES, Defendant in Error.

ABSTRACT OF RECORD, BRIEF AND ARGUMENT
OF PLAINTIFF IN ERROR.

1 THE UNITED STATES OF AMERICA, *District of Kansas, ss:*

In the district court of the said United States, in and for the said district, September term, 1891.

THE UNITED STATES OF AMERICA, *vs.* CLYDE MATTOX (WHOSE MORE FULL CHRISTIAN name is unknown)	Indictment for murder.

At the term of the district court of the United States of America in and for said district of Kansas, begun and held at Wichita, in said district, on the seventh day of September, in the year of our Lord one thousand eight hundred and ninety-one, the grand jurors of the United States of America, duly impanelled, sworn, and charged to inquire of offenses committed within that part of the Indian Territory lying north of the Canadian River and east of Texas and the one hundredth meridian, not set apart and occupied by the Cherokee, Creek, and Seminole Indian tribes, upon their oaths do find and present that Clyde Mattox (whose more full Christian name is to the grand jurors aforesaid unknown), late of that part of the public domain acquired by the United States of America by the act of Congress approved March 2d, 1889, commonly known as Oklahoma, and being a part of the district of Kansas aforesaid, on or about the 12th day of December, in the year of our Lord one thousand eight hundred and eighty nine, at that part of the district of Kansas aforesaid, the same being a place and district of country under the exclusive jurisdiction of the United States, and within the exclusive jurisdiction of this court, with force and arms, in and
2 the body of one John Mullen, then and there being, feloniously, wilfully, and of his malice aforethought, did make an assault; and that the said Clyde Mattox, with a certain revolving pistol then and there charged with gunpowder and leaden bullets, which said pistol he, the said Clyde Mattox, in his hand then and there had and held, then and there feloniously, wilfully, and of his malice aforethought, did discharge and shoot off, to, against, and upon the said John Mullen, and that the said Clyde Mattox with the leaden bullet aforesaid, out of the pistol aforesaid, then and there, by force of the gunpower aforesaid, by the said Clyde Mattox discharged and shot off as aforesaid, then and there feloniously, wilfully, and of his malice aforethought, did strike, penetrate, and wound him, the said John Mullen, in and upon the right breast of him, the said John Mullen, giving to him, the said John Mullen, then and there, with the leaden bullet aforesaid, so as aforesaid discharged and shot out of the pistol aforesaid, by the said Clyde Mattox in and upon the right breast of him, the said John Mullen, one mortal wound of the depth of eight inches and of the breadth of half an inch, of which said mortal wound he, said John Mullen, then and there died. And so the jurors aforesaid, upon their oath aforesaid, do say that the said Clyde Mattox him the said

John Mullen, in the manner and by the means aforesaid, feloniously, willfully, and of his malice aforethought, did kill and murder, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the United States of America.

23399——1

Second count.

And the grand jurors aforesaid, upon their oaths aforesaid,
3 duly impanelled, sworn and charged to inquire of offenses committed within that part of the Indian Territory, lying north of the Canadian River, and east of Texas and the one hundredth meridian, not set apart and occupied by the Cherokee, Creek, and Seminole Indian tribes, upon their oaths do find and present that Clyde Mattox (whose more full Christian name is the grand jurors aforesaid unknown) late of that part of the public domain acquired by the United States of America by the act of Congress approved March 2d, 1889, commonly known as Oklahoma, and being a part of the district of Kansas aforesaid, on or about the 12th day of December, in the year of our Lord one thousand eight hundred and eighty-nine, at that part of the district of Kansas aforesaid, the same being a place and district of country under the exclusive jurisdiction of the United States, and within the exclusive jurisdiction of this court with force and arms, in and upon the body of one John Mullen then and there being, feloniously, wilfully, and of his malice aforethought, did make an assault; and that the said Clyde Mattox, with a certain revolving pistol charged with gunpowder and leaden bullets, which said pistol he the said Clyde Mattox in his hand then and there had and held, then and there feloniously, wilfully, and of his malice aforethought, did discharge and shoot off, to, against, and upon the said John Mullen and that the said Clyde Mattox, with the leaden bullet aforesaid, out of the pistol aforesaid, then and there by force of the gunpowder aforesaid, by the said Clyde Mattox discharged and shot off as aforesaid, then and there feloniously, willfully, and of his malice aforethought, did strike, pentrate, and wound him, the said John Mullen, in and upon the back of him, the said John Mullen giving to him the said John Mullen, then and there,
with the leaden bullets aforesaid, so as aforesaid discharged and
4 shot out of the pistol aforesaid, by the said Clyde Mattox in and upon the back of him, the said John Mullen, one mortal wound of the depth of nine inches and of the bredth of half an inch; of which said mortal wound he, the said John Mullen, then and there died. And so the jurors aforesaid, upon their oaths aforesaid, do say that the said Clyde Mattox him the said John Mullen, in the manner and by the means aforesaid, feloniously, wilfully, and of his malice aforethought, did kill and murder, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the United States of America.

Third count.

And the grand jurors aforesaid, upon their oaths aforesaid, duly impanelled, sworn, and charged to inquire of offenses committed within that part of the Indian Territory lying north of the Canadian River and east of Texas and the one-hundredth meridian not set apart and occupied by the Cherokee, Creek, and Seminole Indian tribes, upon their oaths do find and present that Clyde Mattox (whose more full Christian name is to the grand jurors aforesaid unknown), late of that part of the public domain acquired by the United States of America by the act of Congress approved March 2d, 1889, commonly known as Oklahoma, and being a part of the district of Kansas aforesaid, on or about the 12th day of December, in the year of our Lord one thousand eight hundred and eighty-nine, at that part of the district of Kansas aforesaid, the same being a place and district of country under the exclusive jurisdiction of the United States and within the exclusive jurisdiction of this court, with force and arms in and upon the body of one John Mullen then and there being, feloniously, wilfully, and of his malice aforethought, did make an assault, and that the said Clyde Mattox, with a certain revolving pistol then and there charged with gunpowder and leaden bullets, which said pistol he, the said Clyde Mattox, in his hand then and there had and held, then and there feloniously, wilfully, and of his malice aforethought did discharge and shoot off, to, against, and upon the said John Mullen, and that the said Clyde Mattox, with the leaden bullet aforesaid, out of the pistol aforesaid, then and there, by force of the gunpowder aforesaid, by the said Clyde Mattox discharged and shot off as aforesaid, then and there feloniously, wilfully, and of his malice aforethought did strike, penetrate, and wound him, the said John Mullen, in and upon the abdomen of him, the said John Mullen, giving to him, the said John Mullen, then and there, with the leaden bullet aforesaid, so as aforesaid discharged and shot out of the pistol aforesaid by the said Clyde Mattox in and upon the abdomen of him, the said John Mullen, one mortal wound of the depth of nine inches and of the breadth of half an inch, of which said mortal wound he, the said John Mullen, then and there died; and so the jurors aforesaid, upon their oaths aforesaid, do say that the said Clyde Mattox, him, the said John Mullen, in the manner and by the means aforesaid, feloniously, wilfully, and of his malice aforethought, did kill and murder, contrary to the form of the statute in such cases made and provided and against the peace and dignity of the United States of America.

P. L. SOPER,
Assistant U, S. Attorney, District of Kansas.

(Endorsed:) No. 900. United States vs. Clyde Mattox. Murder. A true bill. J. W. Hamilton, foreman. Witnesses: Dr. W. R. Thompson, Thomas Whitman, Charity Whitman, Laura Walker, Joe Watson, Lizzie Walls, Elisha Hopkins, Nancy Bates, Lizzie Rowley, Oklahoma City; Geo. L. Walker, Thomas Rob-

erts, Nick Brown, Capt. D. F. Stiles, C. W. Price, T. J. Woodson, Will R. Walter, J. N. Haynes, Martin Bate, M. Woodson, Robert Williams, Morgan Wright, Geo. Thornton, J. R. Jacobs, J. B. Koonce, H. E. Stanley, Joe Morris, John Naron, W. N. Naron. Filed Sept. 25th, 1891. J. C. Wilson, clerk, by J. F. Shearman, D. C.

MONDAY, October 5th, 1891.

UNITED STATES, vs. CLYDE MATTOX. } 900. Murder.

Now comes as well the plaintiff, by J. W. Ady, U. S. atty., as the said defendant by J. W. Johnson and T. F. McMechan, his attotneys, and said defendant, being arraigned on the indictment herein, pleads not guilty hereto and to try the matters submitted to them in the above cause comes the following jury, to-wit. V. S. Musil, John B. Dickey R. J. Herrin, J. A. Scandrett, F. B. Hoyt, D. J. Davis A. W. Groves, A. E. Snyder, Max Lamont, B. F. McGill, Samuel Booth, James P. Hall, who, being duly empanelled and sworn, the trial of the cause is proceeded with, and the hour of adjournment having arrived further consideration of this cause is postponed until to-morrow.

THURSDAY, October 8th, 1891.

UNITED STATES, vs. CLYDE MATTOX. } 900. Murder.

Now, on this day comes the parties same as before, and the jury heretofore duly impaneled in this case return into open court, and, through their foreman, present the following verdict, to-wit:

"We, the jury in the above-entitled cause, duly empaneled and sworn, upon our oaths find the defendant, Clyde Mattox, guilty as charged in the indictment." J. P. Hall, foreman.

Mrs. H. HATCH, a witness on behalf of the defense, being first duly sworn, testifies as follows:

Direct examination by Mr. JOHNSON.

Q. What are your initials?
A. H.
Q. What relation are you to the defendant?
A. I am his mother.
Q. Do you know Tom Whitman?
A. Yes, sir.
Q. The witness who has testified here?
A. Yes, Sir.
Q. Tell the jury what and all, if you please, if anything, he has said to you since your son has been here charged with this crime touching what he knew about it, what he has asked you to do, etc.

By the COURT. You may ask her the same question that you asked Thomas Whitman. Ask her to state whether the facts stated by him—

you may ask the same question. I do not care about going into a long rambling conversation; it will take all the afternoon.

Q. Where did you reside during the months of June, July, and August.

172 A. On Main st.

Q. Where?

A. In Oklahoma City.

Q. State whether or not on Saturday evening in the month of June last Thomas Whitman came to you and asked you to let him have some money to get something to eat for Sunday, and said he had been working for railroad men, and they had not paid him, and whether or not at that time you gave him a five-dollar bill and told him to get you some coffee, and upon his return you loaned him a dollar?

A. I did.

Q. State whether or not on Sunday, about two weeks subsequent to that time he came to you at the same place and told you that he wanted to talk with you, and upon being invited into the house, you asked him what he wanted, and he said "I have come to say this, that I am never going to say it again that it was Clyde that done that shooting?"

A. Yes, he said that.

Q. Wait a moment "I may be mistaken, and the night was so dark." Upon which you said, "Tom, are you going to say that?" Upon which he replied, "All you have to do is to try me."

A. Yes, sir.

Q. Whereupon he asked you to let him have twenty dollars to send his wife to Birmingham, Alabama.

Mr. ADY, I object.

(Overruled.)

A. Yes; he asked me that.

Q. Mrs. Hatch state whether or not in the month of July or August last Tom came to you at your home and said to you that

172 he had a telegram from Soper, assistant U. S. attorney in this district, asking him to come to Topeka, and asked you for five dollars to go on?

A. He did; he said he had received it on Saturday night.

By the COURT (to witness). Wait.

Q. I will ask you whether or not in the month of July or August last, or at any other time, at your home or any other place, in the presence of Wells or Love or both of them, or anyone else, you ever said to Tom that if he would help you you would give him fifty dollars and a good claim?

A. No, sir; I didn't have any claim; I never said it. He asked me to let him have thirty-five dollars; lend it—

Q. Wait, Mrs. Hatch. Mrs. Hatch, have you ever at any time or place, or in any way offered Tom Whitman money or any consideration if he would testify in this case as you want him to?

A. No, sir.

Q. Wait a moment.

Mr. ADY. It is answered.

Q. Mrs. Hatch, do you remember the occasion on which Mullen was killed, John?

A. Yes, sir.

Q. Where did you reside at that time?

A. I lived on Reno, on Reno st. down there.

Q. In Oklahoma City?

A. Yes, sir.

Q. When did you first hear that John was shot?

A. As well as I remember Thornton came to my door about eleven o'clock at night, rapped on the door; I got up and went to the
173 door and asked who it was. He said it was Thornton. I just barely opened the door a little bit. He asked me if Clyde was in. I told him "No." He asked me where Clyde was. I told him I didn't know; that Clyde told me that evening that he was going on some business for Dr. East. He said you tell Clyde when he comes that I want him to come to my office; I want to see him. He left at that.

Q. My question was when you first heard of the shooting of John Mullen?

Mr. ADY. She has told.

By the COURT. Answer the question.

A. It was about an hour after that. Mr. Housell, in the drug store, came and told me that this man was killed.

Q. Did you know John Mullen in his lifetime?

A. I did not.

Q. Did you see him at any time, after he was wounded, before his death?

A. Yes; the next morning between nine and ten o'clock, I think.

Q. Where did you see him?

A. At Mrs. Walker's.

Q. Where he was shot; where he died?

A. Yes sir, where he died.

Q. What was the occasion of your going to see him?

By the COURT. Is that material?

Mr. JOHNSON. I think it is. I want to show a statement that he made to her. She says she was a stranger; I want to show how she happened to go there.

By the COURT. She may answer the question.

Q. Will you tell briefly the way you happened to go there?

174 A. I heard that Clyde was accused of the killing; the next morning I went down there to see him—the next morning, in company with Dr. Graham. We went into the house and the Dr. went back to the cot where Mullin was lying, said a few words to him and then came to me and said——

Q. Wait a moment.

A. I asked the Dr. if I might go and speak to him, and he said

"Yes," I went and and asked Mullin ——

Mr. ADY. I object to any conversation between her and Mullin.

Q. Do you know, Mrs. Hatch, how long it was after that time before he died?

A. He died about one o'clock, I think.

Q. Could you from your observation and knowledge judge of what condition he was in?

A. I thought he was dying. I asked Dr. Graham, and he said he was.

Q. Do you know from anything that John said at that time what he thought of his condition?

A. I do not.

Q. Did you or not at that time—you say Dr. Graham was a practicing physician?

A. Yes, sir.

Q. Do you know whether or not he had charge of the case or not?

A. Yes; he gave him some medicine while I was there in the house "to ease him," he said.

Q. Do you know from anything that was—did you or not hear any statement made by the Dr. at that time to John as to his condition, or what the result was liable to be or would be?

175 By the COURT. Wait, wait. Mr. Johnson, right along there you strike a sand-bar that I am afraid you cannot get over.

Mr. JOHNSON. I will have to bring the Dr.

That is all.

Mrs. Hatch recalled and the following question in writing, which was first submitted to the court and which the court ordered incorporated into the record without the question going to the jury:

Q. Did or did not John Mullin say to you on the morning you visited him, and after Dr. Graham had told him that all the chances for life were against him, say to you, "I know Clyde Mattox, your son, and he was not one of the parties who shot me."

(Objected to on the ground of being incompetent. Objection sustained. Defendant excepts.)

Defendant rests.

Plaintiff's rebuttal.

Dr. SAMUEL GRAHAM, a witness on the behalf of the defense, being first duly sworn, testifies as follows:

Direct examination by Mr. JOHNSON:

Q. What are your initials?

A. Samuel.

Q. Where do you live, Dr.?

A. In Oklahoma City.

Q. What is your profession?

A. Physician.

Q. Where did you reside during the month of December, 1889?

A. In Oklahoma City.

Q. Did you know John Mullin in his litetime, a colored man?

A. Well, yes; I had met him.

Q. I will ask you whether or not you remember the circumstance of his being shot, of his death and before he was dead, and of his death?

A. Yes, sir.

Q. Dr., at what time in the night did you first learn of his being wounded or shot?

177 A. I think a little after nine o'clock.

Q. How did you learn it, Dr?

A. I just had gone to bed.

Q. How did you learn it?

A. I learned it from Mr. ———, a colored gentleman, coming for me to go down there.

Q. Do you know who the colored man was?

A. I don't remember his name; he was a yellow-colored man.

Q. You visited him on that night?

A. Yes, sir.

Q. Did you visit him at any other time?

A. Yes, sir.

Q. When did you next visit him?

A. The next morning. I stayed with him that night until about one o'clock; probably a little after.

Q. What time the next morning did you visit him?

A. Between eight and nine o'clock.

Q. Who, if anybody was there besides yourself while you were at the house?

A. There was a number first when I went there; some colored people and some of them was white; who it was I could not say.

Q. Are you acquainted with Mrs. Hatch, the mother of Clyde Mattox, this lady?

A. Slightly acquainted.

Q. I will ask you whether or not she was there on that morning?

A. Yes; she went down with me.

Q. From what point in the street?

178 A. Well, I think I had been down there. I met him; he and I were talking. I think it was probably a block from Reno; she came up and was going down and she did go down with me.

Q. Tell the jury what condition you found him in at that time, if you please.

A. The next morning?

Q. Yes, sir,

A. He was about in the same condition as the evening before, in regards to the pulse and looks of the man; that is all I have to go by.

Q. What did you regard his physical condition at that time, or the chances of his recovery?

A. I regarded his chances—that all the chances were against him.

Q. State if you please, Dr., whether or not on that morning and while there you had any conversation with him touching his condition

or made any statement to him as to his condition, or the probability of his recovery?

A. Yes, sir; I did on that evening; I had on that evening.

Q. You mean the night before?

A. Yes, sir.

Q. I am asking particularly as to this morning.

A. Yes, I had.

Q. Will you tell the jury, if you please, what you said to him?

A. As near as I can remember, Tom, I always called him, but I found out since his name was John; I never was acquainted with him but a little; he sawed some wood for me——

By the COURT. Never mind that.

179 A. He asked my opinion; I told him. I said, "the chances are all against you; I don't think there is any show for you at all."

Q. Do you know what time he died?

A. I think he died about one or two o'clock the second day.

Q. This same day you speak of?

A. Yes, sir; the same day I went out to see him.

Q. Were you present at the time of his death?

A. I think I was; yes, sir.

Q. Dr., did he or not make any statement to you or in your presence on that day and after you had told him as to his physical condition as to who it was or what his knowledge was as to who shot him?

A. Yes, sir; he said he didn't have any knowledge of who shot him. I interrogated him about three times in regard to that—who did the shooting—and he didn't know.

Q. I will ask you, doctor, whether or not you heard him after the time I speak of, and you told him as to his physical condition, make any statement to Mrs. Hatch as to who it was shot him, or as to what knowledge he had as to who shot him?

A. He didn't know.

Mr ADY. Wait; don't state what he said to Mrs. Hatch; I object.

By the COURT. The Dr. may testify to what he said. He knows what he said; it brings it perhaps a little nearer within the rule, but not as to what he said to Mrs. Hatch.

Q. State to the jury what you heard him say to Mrs. Hatch as follows——

By the COURT. No, sir.

Mr. JOHNSON. After that time.

By the COURT. You may state what he said in relation to the

180 shooting, who did the shooting. You asked him that question; he answered the men did, and said that he did not know. I will not allow the conversation beyond that.

Mr. ADY. It has not been proven that the party knew that death was impending.

Mr. JOHNSON. May I not show his statement as to who did the shooting?

By the COURT. The fact is that you know that you have not a proper foundation. Mr. Ady did not object and I allowed it. You have carried the matter thus far without objection, but I think———

Mr. JOHNSON. I am inclined to think that under a proper consideration of the rules I have not exceeded it. I know that you have got to show that the party was in extreme—when I show that the physician who was doctoring the party tells him, as the doctor says he did, and that he died within four hours———

By the COURT. But the Dr. didn't have much hope, but the question is what the man thought about it. These statements—you understand how rigid the rule is and the very great necessity for being rigid, taking the testimony of a man who is dead and can not testify.

Mr. JOHNSON. I agree with your honor as to the necessity of the rule. I want to submit this. It sometimes happens that the statement of a dying man is taken as when it is not shown and can not be shown that by any statemen of his that he had any opinion as to his condition, but the book say, as I understand them, that if I can show by his physical condition at the time, the statement of his physician and
181 the near decease of the party, if I can show enough to make it apparent that a reasonable man might believe and anticipate an early death, that that is sufficient. There is one thing I have left out; I have not asked the doctor whether this man was conscious; but I believe that in the rule laid down by Wharton that we are not required to show any statement of the party. I have not shown that he was conscious. I appreciate the rule and it is a very righteous one and ought to be rigid.

By the COURT. There is no question raised as to that. The fact is, the question has gone in and been answered without objection. You have asked the question inquiring of this witness whether or not he had a conversation with him and he said he did. I think he said he didn't know.

Mr. JOHNSON. Will you permit a suggestion? May I not prove the statement of this man made there at that time? We will assume, your honor, that I know A and know the parties C, D, E, F, and G. If A, B, and C struck me I would know it; I know them; I saw the men who shot me, but I would not say I did not know who shot me. May I not prove the statement in this case?

By the COURT. I do not know the purpose. If you want to discuss, I will send the jury out. I will not permit you to impeach your own witness; he said he did not know.

Mr. JOHNSON. Will your honor———

By the COURT. I will not permit it

Q. Doctor, what was John Mullin's condition at this time mentally as to whether he was conscious or unconscious?

A. He was perfectly conscious. He was in a normal condition as regard his mind.

182 Mr. Johnson submits the following questions in writing to the court, which the witness is not permitted to answer, and which

the court ordered incorporated into the record without the question going to the jury:

Q. Did or did not John Mullin in your presence and at that time, say in reply to a question of Mrs. Hatch, "I know your son Clyde Mattox, and he did not shoot me; I saw the parties who shot me and Clyde was not one of them."

ADY. Objection as incompetent.

(Sustained. Defendant excepts.)

Cross-examination of Dr. Samuel Graham by Mr. ADY.

Q. How long have you been in Oklahoma City?

A. I have been there off and on from the time it opened up.

Q. Practicing medicine ever since you have been there?

A Yes; most of the time.

Q. How long did you practice prior to that?

A. Since '72; I was graduated——

Q. Where did you practice prior to that?

A. I was a great many places.

Question by JUROR What school are you a graduate of?

A Indianapolis Medical College.

Q. Cincinnati, did you say?

A Indianapolis. In 1875, the date of my commission—diploma, I mean.

221 In the district court of the United States for the district of Kansas.

THE UNITED STATES }
vs }
CLYDE MATTOM. }

Charge to jury.

Gentlemen of the jury, the indictment in this case is brought under section 5339 of the Revised Statutes of the United States, which provides "that any person who maliously strikes, wounds, poisons, or shoots at another person within any place under the exclusive jurisdiction of the United States, of which striking, wounding, poisoning, or shooting such other person dies, shall be deemed guilty of murder." There is no controversy in this case as to the fact that the place in which the offense is alleged to have been committed was a place within the exclusive jurisdiction of the United States, and within the jurisdiction of this court if you find the place to be the place mentioned in the indictment. Hence, if you find from the evidence that an offence has been committed, and that it was at the place mentioned in the indictment, then you are instructed that it was committed at a place within the exclusive jurisdiction of the United States and within the jurisdiction of this court.

Two distinct propositions are submitted under this indictment for your consideration:

First. Was the act itself done; that is to say, was the person alleged to have been killed in fact killed?

Second. Was it done by the defendant in this case?

In other words, there must be proof of the death of the person; that is to say, there must be evidence which satisfies your minds
212 that John Mullen was killed; and second, that he was killed by this defendant, or that the defendant was present at the time the crime was committed, and consented thereto or took part therein as will be more fully explained at another place in these instructions.

In the trial of a criminal cause the person accused is entitled to the benefit of the legal presumption of innocence. This the law gives him, and you in your deliberations must accord him, for it is an inflexible rule of the criminal law that the guilt of the accused must be fully proved. Neither a preponderance of the evidence, nor any weight of preponderant evidence is sufficient for the purpose unless it generates full belief in your minds of the fact to the exclusion of all reasonable doubt.

A reasonable doubt is not a mere possible doubt, for everything relating to human affairs and depending upon moral evidence is open to some possible or imaginary doubt. A reasonable doubt is that state of the case which after a comparison and consideration of all the evidence in the case leaves your mind in that condition that you cannot say that you feel an abiding conviction to a moral certainty of the truth of the charge. The burden of proof is upon the prosecution. All of the presumptions of law independent of the evidence are in favor of innocence, and every person is presumed to be innocent until his guilt is established by the evidence. The evidence must establish the truth of the fact to a reasonable and a moral certainty, a certainty which convinces and directs the understanding and satisfies the reason and judgment of those bound to act conscientiously upon it. When the evidence does so satisfy your minds to a reasonable and a moral certainty of the truth of the fact you are satisfied beyond a reasonable doubt. You are the judges of the weight of the evidence and
213 the credibility of the witnesses. It is your duty to harmonize the evidence upon the theory of innocence if that can be done; the facts must be consistent with each other and with the main fact sought to be proved. The circumstances taken altogether must be of a conclusive nature, producing in your minds a reasonable and a moral certainty that the person charged in the indictment committed the offence, or assisted in committing the offence.

The law makes the defendant a competent witness in his own behalf. He may be sworn at his own request and testify as other witnesses in the case. The jury, however, are the judges of the weight which ought to be attached to the testimony, and in considering what weight should be given it you should take into consideration all of the facts and circumstances concerning the case as disclosed by the evidence and give his testimony such weight as you believe it entitled to in view of all the circumstances proved on the trial, and in considering the weight which should be given his testimony, and as bearing upon the question of his credibility, you have a right to take into consideration his inter-

est in the result of the trial.

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As stated at the outset, two main propositions will be submitted to you, the first of which was whether or not the person alleged to have been killed was, in fact, killed. Second, whether or not the defendant committed the offence, or that he was present consenting to or aiding in its commission, and in order that you may more fully understand what was meant by being present, aiding, or consenting to the commission of the offence, it may be profitable for me to explain to you at this point the rule by which you are to be guided; a crime may consist of many acts, which must all be committed in order to complete
214 the offense, and the law is that each person present consenting to the commission of the offense, and doing any one act which is an ingredient of the crime, or immediately connected with it or leading to its commission, is as much a principal as if he had with his own hand committed the whole offense. The indictment in this case charges that this defendant, on the 12th day of December, 1889, feloniously, wilfully and of his malice did kill and murder John Mullen. The time alleged in the indictment, while it is a fact to be shown by the evidence, is not material, except that you must find from the evidence that the offense was committed prior to the finding of the indictment. The indictment also alleges that the killing was maliously done. This, also, it is necessary for you to find from the evidence before you can return a verdict of guilty, for it is only where the killing is done with malice that it constitutes the crime of murder. Malice, however, may be shown, first, by proof of death; second, that the death of the person alleged to have been killed was the result of the use by the defendant of a dangerous or deadly weapon; as, for example, where the killing was done by means of a gun-shot or pistol-shot wound, which wound resulted in the death of the deceased. The law is that every man is presumed to intend the consequences of his acts. Hence, if it is shown by the evidence that the person alleged in the indictment to have been killed is in fact dead, and that he came to his death by means of a gun or pistol shot wound, the presumption is, and the presumption is conclusive if unexplained, that the person who caused the death did it maliciously. Hence, if you find from the evidence in this case that the deceased came to his death at the hands of this defendant in the manner and by the means charged in the indictment, then you are instructed in the absence of any satisfactory explanation,
215 that the presumption of law is that it was done with malice, and the Government, in its proof of the allegation of malice mentioned in the indictment, need go no further than to show that fact.

There seems to be no conflict in the evidence in this case as to the fact that John Mullin was killed at the time mentioned in the indictment and that he came to his death by means of a pistol-shot wound inflicted upon his person at the hands of some one, and while, as already suggested, these are matters which you must be satisfied of, I call your

attention to the condition of the evidence as it occurs to me in order that you may more speedily reach the consideration of what seems to me to be the only remaining question in the case, namely: Did John Mullen come to his death, in the manner and by means charged in the indictment, at the hands of this defendant, or was the defendant present consenting and aiding in the commission of the offence at the time Mullen was killed? While all of the propositions mentioned are matters which you must determine, and the whole question is left for your determination, yet, is seems to me, that the last one suggested is the only one about which there is any conflict in the evidence in this case. The evidence in the case consists of what is known in the law as positive evidence, that is, testimony of eyewitnesses, coupled also with some circumstances occurring soon after the alleged killing of Mullin bearing upon the question of the identity of the defendant. Circumstantial evidence is legal evidence, and is to be considered by the jury in connection with all of the evidence given upon the trial of the case. The entire evidence, both positive and the circumstances proved on the trial, should be fully considered by the jury, and after a careful consideration of all the evidence, if you are satisfied to a reasonable and a moral certainty that the defendant in this case committed the offense charged in this indictment, your duty is plain under
216 the law to say so by your verdict of guilty, for the law exacts a conviction where there is legal evidence to show the guilt of the defendant beyond a reasonable doubt, and if the proof in this case so satifies your minds, you have no discretion and no dispensing power under you oaths. The law is your only guide to your verdict. You are not to look at its consequences, nor the punishment which may result. You find only whether or not an offense has been committed such as is defined in the law. It is for the legislative department of the Government to prescribe the punishment of offenses, and it is not for you or for the court to arraign their justice or wisdom in performing our respective duties in the administration of justice. We must go in the safe road prescribed by the laws as their expounders, but without assuming the power to repeal, alter, dispense or annul, their provisions. We can not vary the rules of evidence in their application to offenses of a greater or less degree; they are the same regardless of the question of punishment. No man can be convicted of a criminal offense except upon clear and satifactory proof of guilt. The evidence must be the best of the nature of the case and the ability of the party admits of, and the law must meet the evidence and the case. If, in the opinion of the jury, a case is here made out, it is your duty to so find. The juror violates every duty if, when his reason and judgment are entirely convinced of the guilt of the accused, he act against such conviction from feelings of humanity arising from the nature of the punishment which may follow a verdict of guilty. The law and the evidence only are to be considered by you in arriving at your verdict. Appeals are frequently made in trials of criminal cases to the feelings

of jurors to induce them to be influenced by other considera-
217 tions than such as grow out of the law and the evidence. Such appeals must be listened to with caution, for your oath as jurors makes the law your only guide to your verdict.

The questions then to be considered by you are:

First. Is the person alleged in the indictment to have been killed in fact dead?

Second. Did he come to his death in the manner and by the means described in the indictment?

Third. was the offense committed at the place alleged in the indictment?

Fourth. Did this defendant commit the offense or assist at its commission?

If, after a consideration of all the evidence in this case, you can answer the questions in the affirmative, your duty is plain to say so by your verdict of guilty. If, on the other hand, you have a reasonable doubt as to either of these propositions arising in your minds from the consideration of the evidence in the case, you must acquit, but the doubt must be a reasonable doubt, that is an honest doubt arising from the consideration of all the evidence in the case. It must not be a doubt of the policy, justice, or binding power of the law, or in any way growing out of the degree of the punishment which may follow a conviction.

With these instructions as to the law, the case is submitted to you.

220 UNITED STATES OF AMERICA,
District of Kansas, ss:

UNITED STATES OF AMERICA
vs.
CLYDE MATTOX. } Indictment: Murder.

Motion for a new trial.

Comes now the defendant in the above entitled cause and moves the court to set aside the verdict herein and grant a new trial in this case, and assigns as reasons therefor the following:

1st. The verdict is not sustained by sufficient evidence.

2d. The verdict is against the evidence.

3d. The court erred in the rejection of the testimony of the witnesses, Dr. Samuel Graham and Mrs. S. W. Hatch, offered on the part of the defendant, in refusing to permit the witness, Graham, to answer the following question, propounded by the defendant, to-wit: "Did or did not John Mullen in your presence and at that time, say in reply to a question of Mrs. Hatch, "I know you son, Clyde Mattox, and he did not shoot me. I saw the parties who shot me, and he was not one of them." And in refusing to permit the witness, Mrs. S. W. Hatch, to answer the following question, propounded by the defendant. "State whether or not John Mullen, on the morning of his death, and while you were present with him with the witness, Dr. Graham, and after the doctor had informed him that all the chances for life were against

him, in answer to a question propounded by you, say: "I saw the parties who shot me, and I did not know them. I know your son, Clyde Mattox, and he was not one of the parties who shot me."

4th. Surprise to the defendant in testimony offered on the part of the Government, to wit, the testimony of Charity Whitman, wherein she testified that she was present at the shooting of the deceased, and there recognized this defendant as one of the parties who did the shooting, whereas the said Charity Whitman was sworn and testified
221 as a witness on the part of the Government in the preliminary examination of the defendant in Oklahoma City, I. T., in the month of Feb. 1890, before Wm. A. Monroe, U. S. commissioner, at which time the said Charity Whitman testified that she was present at such shooting and saw the shooting and the parties who did it, and that she could not recognize this defendant, and did not recognize him as one of the parties who did such shooting. Whereupon the defendant immediately made an application to the court for a subpœna for Wm. A. Monroe, as a witness in his behalf, the said Wm. A. Monroe being U. S. commissioner, before whom said preliminary examination was held. The court granted said application and caused a subpœna to be issued for said Monroe, but stated that said cause would not be delayed for his appearance. Said Monroe was not reached, and did not appear until after the case was closed and submitted to the jury. If permitted to obtain the testimony of said Monroe, the said Monroe would have testified that said Charity Whitman appeared and testified as a witness before him in the preliminary trial of this case, and then and there testified that she did not recognize either of the parties who did such shooting, and did not recognize this defendant, Clyde Mattox, as one of the parties who did such shooting.

5th. The court erred in the admission of testimony against and over the objection of the defendant.

6th. Misconduct of Douglas V. Donelly, the bailiff in charge of the jury. Said misconduct consisted of this, that after the jury had been charged by the court, and after they had retired to consider their verdict, and while they were deliberating of their verdict, the said bailiff made remarks in the presence and hearing of the jury to the great injury and prejudice of this defendant, said remarks being
222 as follows: "After you fellows get through with this case it will be tried again down there. Thompson has poison in a bottle that them fellows tried to give him." And at another time the said bailiff, referring to the defendant, Clyde Mattox, in the presence and hearing of the jury and while they were deliberating of their verdict said, "this is the third fellow he has killed."

7th. Misconduct of the bailiff, Douglass V. Donelly, while in charge of the jury and while the jury were deliberating of their verdict, in allowing said jury or some or one of them to purchase and take to the jury room a newspaper printed in the city of Wichita and known as The Wichita Daily Eagle, of the date of Thursday morning, October 8th, 1891. The said newspaper being purchased and taken to the jury

room by a member of the jury, contained a comment upon the case upon which the jury was then deliberating.

8th. Improper conduct of the jury in procuring to be introduced into the jury room while they were deliberating of their verdict on this case, and having read in their presence and hearing while so deliberating, the comments of the Wichita Daily Eagle, a newspaper printed and published in the city of Wichita, Kansas, in its issue of Thursday morning, October 8, 1891. Said comments of said newspaper introduced into the jury room, and read by them and in their presence and hearing were as follows: "The destiny of Clyde Mattox is now in the hands of twelve citizens of Kansas composing the jury in his case. If he is not found guilty of murder he will be a lucky man, for the evidence against him was very strong, or at least appeared to be to an outsider. The case was given to the jury at noon yesterday, and it was expected that their deliberations would not last an hour before they would return a verdict. The hour passed and nine more
223 of them with it, and still a verdict was not reached by 10:30 last night, when the jury adjourned and went to their rooms at the Carey. Col. Johnson, of Oklahoma City, defended him, and made an excellent speech in his behalf to the jury. Mr. Ady also made a fine speech, and one that was full of argument and replete with the details of the crime committed, as gathered from the statements of witnesses. The lawyers who were present and the court officers also agree that it was one of the best and most logical speeches Mr. Ady ever made in this court. It was so strong that the friends of Mattox gave up all hope of any result but conviction. Judge Riner's instructions to the jury were very clear and impartial, and required nearly a half hour for him to read them. When the jury filed out, Mattox seemed to be the most unconcerned man in the room. His mother was very pale and her face indicated that she had but very little hope. She is certainly deserving of a good deal of credit, for she has stuck by her son as only a mother can, through all his trials and difficulties and this is not the first one by any means, for Clyde has been tried for his life one before. He is a youthful looking man, of light build, a beardless face, and a nervous disposition. The crime for which he has just been tried is the killing of a colored man, in Oklahoma City, over two years ago. Nobody saw him do the killing, and the evidence against him is purely circumstantial but very strong, it is claimed by those who heard all the testimony."

9th. The court erred in the admission of testimony offered on the part of the Government and admitted over the objection of the defendant.

Defendant files herewith in support of his allegations herein
224 made affidavit marked Exhibit A & B & C and D, and a copy of said newspaper, The Wichita Daily Eagle, marked Exhibit D.

J. W. JOHNSON & WILSON & MCMECHAN,
Attorneys for Drfendant.

fifth page of said paper, and in the third column of said paper, and is as follows:

The Mattox case.—The jury retired at noon yesterday and is still out.

"The destiny of Clyde Mattox is now in the hands of twelve citizens of Kansas composing the jury in his case. If he is not found guilty of murder he will be a lucky man, for the evidence against him was very strong, or at least appeared to be to an outsider. The case was given to the jury at noon yesterday, and it was expected that their deliberations would not last an hour before they would return a verdict. The hour passed and nine more
223 of them with it, and still a verdict was not reached by 10:30 last night, when the jury adjourned and went to their rooms at the Carey. Col. Johnson, of Oklahoma City, defended him, and made an excellent speech in his behalf to the jury. Mr. Ady also made a fine speech, and one that was full of argument and replete with the details of the crime committed, as gathered from the statements of witnesses. The lawyers who were present and the court officers also agree that it was one of the best and most logical speeches Mr. Ady ever made in this court. It was so strong that the friends of Mattox gave up all hope of any result but conviction. Judge Riner's instructions to the jury were very clear and impartial, and required nearly a half hour for him to read them. When the jury filed out, Mattox seemed to be the most unconcerned man in the room. His mother was very pale and her face indicated that she had but very little hope. She is certainly deserving of a good deal of credit, for she has stuck by her son as only a mother can, through all his trials and difficulties. and this is not the first one by any means, for Clyde has been tried for his life one before. He is a youthful looking man, of light build, a beardless face, and a nervous disposition. The crime for which he has just been tried is the killing of a colored man, in Oklahoma City, over two years ago. Nobody saw him do the killing, and the evidence against him is purely circumstantial but very strong, it is claimed by those who heard all the testimony."

F. B. HOYT.
A. E. SNYDER.
D. J. DAVIS.
J. A. SCANDRETT.
J. P. HALL.
R. J. HERRIN.
SAMUEL BOOTH.

Subscribed and sworn to before me this 9th day of Oct., 1891.
[SEAL.] THOMAS O. HOSS,
Notary Publie.

My commission expires March 18, 1895.

19 UNITED STATES OF AMERICA, *Destrict of Kansas, ss:*

At a term of the district court of the United States of America for

the district of Kansas, begun and held at the city of Wichita, in said district, on Monday, the 21st day of September, 1891, proceedings were had, and appear of record, in words and figures following, to wit:

FRIDAY, October 9th, 1891.

UNITED STATES
vs
CLYDE MATTOX. } 900. Murder.

Now comes the parties same as before, and the motions for a new trial and in arrest of judgment heretofore filed herein coming on to be heard and being argued by counsel, are by the court overruled, to which ruling of the court the defendant, by his attorney, at the time duly excepts. Thereupon the court, on the verdict of guilty heretofore rendered herein, passed sentence upon said defendant as follows: Having first asked said defendant if he had any reason to give why sentence of the court should not be passed upon him, and he having replied that he had none, it is therefore considered, ordered, and adjudged, and the sentence of the court is, that you, the said Clyde Mattox, be confined in the Sedgwick County jail, or some other suitable place of confinement within the district of Kansas, until Thursday, January 14th, 1892, and on that day between the hour of 10 a.m. & 4 p.m. that you be taken by the marshal of said district of Kansas, from said jail to some suitable place in said county of Sedgwick, in the district of Kansas, and that you then and there be hanged by the neck until you are dead.

And said motion for new trial and in arrest of judgment were respectively overruled, to which rulings and decision said defendant duly excepted, and to the order made by said court overruling said motions and exceptions thereto were duly entered of record on the journals of said court.

232 And inasmuch as the said several matters so produced and given in evidence on the part of the plaintiff, the United States of America, and as the question as to the competency of said witnesses and each of them to testify, and to the exclusion of testimony offered on the part of the defendant, and as the said instruction so given by said court to the jury at said trial, and the affidavits offered on the part of the defendant to sustain his motion for new trial, which were not permitted to be read in support of said motion, and the objections and exceptions thereto made by said Clyde Mattox, defendant, by his said counsel, do not appear of record in said cause, that said counsel for said defendant do now present this bill of exceptions to the judge of said court before whom said cause was tried, and within the time allowed by the court for that purpose, and requests that the same may be signed and allowed and made a part of the record herein, all of which is done as prayed for this second day of December, 1891.

JOHN A. RINER, *Judge.*

235 In the district court of the United States of America for the district court of Kansas.

THE UNITED STATES OF AMERICA, Plaintiff, vs. CLYDE MATTOX, DEFENDANT. } No. 900. Indictment for murder.

To the honorable the Justices of the Supreme Court of the United States:

Your petitioner, Clyde Mattox, most respectfully represent, that in a certain criminal cause tried and determined in the district court of the United States for the district of Kansas, holden in the city of Wichita, Kansas, at the the September term, 1891, and your petitioner was defendant. Your petitioner, Clyde Mattox, was by the verdict of a jury and the judgment of said district court convicted of murder, alleged to have been committed within that part of the Indian Territory lying north of the Canadian River and east of Texas and the one hundred meridian not set apart and occupied by the Cherokee, Creek, and the Seminole Indian tribes, on the 12th day of Dec., 1889, as charged in the indictment, found and preferred against your petitioner; and petitioner was by the judgment of said court sentenced to suffer death for said supposed offense, and your petitioner is still under such sentence.

And your petitioner further represents that there are manifest errors in the record and proceedings, which errors are specially assigned and numbered and hereto numbered and hereto appended.

And your petitioner desires that said errors may be examined and corrected by your honors, and that your honors may adjudge what of right and according to the laws and customs of the United States should be done therein in the premises.

236 Wherefore, your petitioner prays that your honors may award and issue a writ of error from your honorable court directed to the honorable judge of said district court of the United States for the district of Kansas, commanding him to send your honorable court the record and proceedings aforesaid with all things concerning the same, together with said writs, and that your honorable court may examine and correct the same and pronounce judgment thereon as is right and proper.

CLYDE MATTOX, *Petitioner*,
By J. W. JOHNSON, and
T. F. MCMECHAN, *His Attorneys*.

237 *Assignment of errors.*

In the above-entitled proceedings in error for the district court of the United States of America of the district of Kansas.

The petitioner, Clyde Mattox, makes the following assingment of errors:

First. The said district court erred in the rejection of the testimony of the witness, Dr. Samuel Graham, offered on the part of the defendant in refusing to permit the said witness, Graham, to answer the following questions propounded by the defendant's counsel, to wit:

"Did or did not John Mullin, in your presence and at that time, in

reply to the question of Mrs. Hatch, I know your son, Clyde Mattox, and he did not shoot me, I saw the parties who shot me and Clyde was not one of them." To which ruling of the court the defendant excepted and still excepts (transcript, pages 150–160).

Second. The said district court erred in the rejection of the testimony of the witness, Mrs. Hatch, offered on the part of the defendant in refusing to permit the said witness, Mrs. Hatch, to answer the following question propounded by the defendant's counsel, to wit.

"Did or did not John Mullin say to you on the morning you visited him and after Dr. Graham had told him all the chances for life were against him, say to you, I know Clyde Mattox, your son, and he was not one of the parties who shot me." To which ruling of the court the defendant then and there excepted and still excepts (transcript, page 122).

Third. The said district court erred in overruling defendant's sixth and seventh grounds as alleged in defendant's motion for a new trial in this, that it charged the misconduct of Douglas V. Donelly,
238 the sworn bailiff, who had the jury in charge, said misconduct consisted in this, to wit: That after the jury had been charged by the court and after they had retired to consider of their verdict and while they were deliberating on their verdict, the said bailiff made remarks in the presence and hearing of the jury to the great injury and prejudice of the said defendant, Clyde Mattox, said remarks being as follows:

"After you fellows get through with this case, it will be tried again down there. Thompson has poison in a bottle that them fellows tried to give him." And at another time said bailiff, referring to the defendant, Clyde Mattox, in the presence and hearing of the jury and while they were deliberating of their verdict, said, "This is the third fellow he has killed." And in permitting the said jury, or some one of them, to purchase and take to the jury room a newspaper containing a comment upon the case upon which the jury was then deliberating (transcript, pages 198, 199). To which ruling the defendant, by his counsel, then and there excepted and still excepts.

Fourth. The said district court erred in overruling the defendant's eighth ground, as alleged in his motion for a new trial, which charges misconduct of the jury while they were deliberating of their verdict, and having read in their presence and hearing while so deliberating a newspaper known as the Wichita Daily Eagle of the date of Thursday, October 8th, 1891, said paper containing a comment upon the case which was then being considered by said jury. To which ruling the defendant, by his counsel, then and there excepted and still excepts.

Fifth. That the court erred in excluding from consideration the affidavits of A. E. Snyder, J. A. Scandrett, and F. B. Hoyt, jurors, in support of the sixth and seventh grounds of defendant's motion
239 for a new trial, which said grounds charged misconduct of the bailiff who had the jury in charge, and while they were deliberating on their verdict.

To which ruling of the court the defendant, by his counsel, then and there excepted. (Transcript, pages 202–204).

Sixth. The said district court erred in excluding the affidavits of F. B. Hoyt, A. E. Snyder, D. J. Davis, J. A. Scandrett, J. P. Hall, R. J. Harrin, and Samuel Booth, jurors, offered in support of the eighth ground as set out in defendants motion for a new trial (transcript, pages 205, 206), to which ruling the defendnat then and there excepted.

Seventh. The said district court erred in overruling defendants motion for new trial. (Transcript, pages 197–200). To which ruling of the court the defendant then and there duly excepted and still excepts.

Eighth. The said district court erred in overruling the motion in arrest of judgment (transcript, page 208), each of the several grounds therein stated presented matter sufficient to support said motion.

Respectfully submitted,

CLYDE MATTOX,
By J. W. JOHNSON and T. F. MCMECHAN,
His Attorneys.

241 UNITED STATES OF AMERICA, ss:

The President of the United States, to the honorable the judge of the district court of the United States for the district of Kansas, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea, which is in the said district court, before you, between the United States, plaintiff, and Clyde Mattox, defendant, a manifest error hath happened, to the great damage of the said defendant, as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington within 30 days from the date thereof in the said Supreme Court to be then and there held, that the record and proceedings aforesaid, being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the 16th day of December, in the year of our Lord one thousand eight hundred and ninety-one.

[SEAL.] JAMES H. MCKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by

DAVID J. BREWER,
Associate Justice of the Supreme Court U. S.

242 UNITED STATES OF AMERICA, ss:

The President of the United States, to the United States, greeting:

You are hereby cited and admonished to be and to appear at a Supreme Court of the United States, to be holden at Washington within 30 days from the date thereof, pursuant to a writ of error, filed in the clerk's office of the district court of the United States for the district of Kansas, wherein Clyde Mattox is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable David J. Brewer, Associate Justice of the Supreme Court of the United States, this 16th day of December, in the year of our Lord one thousand eight hundred and ninety-one.

DAVID J. BREWER,
Associate Justice of the Supreme Court U. S.

~~ABSTRACT OF RECORD,~~

BRIEF AND ARGUMENT

OF PLAINTIFF IN ERROR.

Where communications between members of the jury and the officer having them in charge are such that no obvious prejudice could have resulted from them, they will not afford ground for a new trial, but if the communications were such that prejudice may have resulted, the rule is different.

Where communications prejudicial to the accused in a criminal case are made to the jury by the officer having them in charge, such irregularity is sufficient to vitiate a verdict of guilty unless it shall appear beyond all reasonable doubt that no injury to the defendant resulted therefrom.

Thompson & Merriam on Juries, Sec. 362, Sub. Sec. 1, 2, 3, 4 & 5.
State vs. Lautz, 23 Kan., 28.
State vs. Brown, 22 Kan., 222.
Dansby vs State, 34 Tex., 392.
Thompson on Trials, Sec. 2556,2560.
Reins vs People, 30th Ill., 256.
Wilson vs. People, 4th Park Cr. (N. J.) 619, 632.
Hamilton vs Pease, 38th Conn., 115.
Nesmith vs Clinton Fire Ins. Co., 8th Abb. Pr. (N. J.) 141.
People vs Harting, 4th Parker Cr. Rep. 256,314.

We submit the declaration of the bailiff—Donnelly—made in the presence of members of the jury during retirement, to-wit: "This is the third fellow he has killed," (record pages 119 and 120,) could not be otherwise than prejudicial to the defendant. The law does not require the language to be such that it is manifestly prejudicial in order to set aside the verdict; it is sufficient that it is such as *may* have resulted in prejudice. The language here used goes beyond the requirement of the law. It is *manifestly* prejudicial. It could have no other effect.

In criminal cases, and especially in capital felonies, when members of the jury are permitted to read *editorial comments* unfavorable to the accused, a new trial ought always to be granted.

Thompson on Trials, Sec. 2561.
U. S. vs. Gilbert, 2nd Sumn. (U. S.) 19, 81, 82.
Palmore vs State, 29th Ark., 248.
Walker vs State, 37 Tex., 366,389.
Com. vs. Landis, 12 Phila. (Pa.) 576.
U. S. vs. Reid, 12 Howard, 361, 366.
Thompson and Merriman on Juries, Sec. 361,
U. S. vs. McKee, Cent. Law Journal, 258, 259.

The article published in the Wichita Eagle of the 8th October, 1891, page 121 of the record, and which was read to the jury during their retirement, falls within the rule. No means could be invoked which would more certainly impress the jury with public opinion, or supposed public opinion, nor could the sanctity of the jury room be more ruthlessly invaded.

Affidavits of jurors are received to show attempts at bribery, or other corrupt or undue influences.

Affidavits of jurors are admissible to show communications made to them by the officer having them in charge.

Affidavits of jurors will be received for the purpose of avoiding a verdict, to show any matter occurring during the trial, or in the jury room, which does not essentially inhere in the verdict itself.

Thompson on Trials, Sec. 2556.

Wilson vs. People, 4th Park Cr. (N. J.) 619,632.

Thompson & Merriman on Juries, Sec. 262, Sub. Sec. 4 & 5.
" " " " " 364, " " 6.
" " " " " 448.

Nelson vs. State, 13 Sneed & M (Miss.) 500, 508.

Taylor vs. Everett, 2 How. Pr. 32,

Thomas vs. Chapman, 45 Bark. 98.

People vs. Hartung, 4th Parker Cr. Rep. 256,314.

Gottleib vs. Jasper, 27 Kan., 776.

U. S. vs. Reid, 12 Howard, 361.

Farrar vs State, 2 Ohio St. 54.

Opinion by Dillon and Treat, Judges, over-ruling motion for new trial in U. S. vs McKee, 3 Central Law Journal, 258, 259.

The affidavit, pages 120, and 121 of the record, does not show who introduced, or who read the article in the Wichita Eagle there set out. Certainly, if the act of a person not a member of the jury, the fact may be shown by testimony of members of the jury. The presumption being that the jury acted within the line of duty, will it not be presumed that it was not the act of the jury or any member of it?

But, if the act of the jury, may not the fact of introduction and reading of the article be shown by members of the jury?

It does not disclose a matter which inheres in the verdict, or rests in the consciousness of any individual juror; neither does it appear what, if any, influence was had upon the verdict. We submit, however, that the influence of such an article in a leading daily paper when read to to the jury could not be other than harmful to the defendant.

In view of the authorities above cited, we submit that the court erred in his refusal to permit the defendant to file the affidavits, exhibits "B," "D" and "C," pages 119 and 120 of the record, disclosing the misconduct of the bailiff, Donnelly, and in his refusal to consider the same, and while, perhaps, the right of the defendant to have the affidavit, exhibit "A," pages 120 and 121 of the record, showing the introduction and reading of the newspaper article in their presence filed and considered, is not so clear; still we believe the reasoning of the authorities in support of such right to be in accordance with every principle of right and justice. The baleful influence of the newspaper comment cannot be doubted. The injury is complete. Notwithstanding the evidence in the case was such that the jury might convit or acquit without exposing itself to just criticism, still with a bailiff declaring to the jury during its retirement that the defendant had killed three men; thus, not only adding his own testimony to the guilt of the defendant

of the crime for which he was then on trial, but also testifying that he had killed two other men, and with an influential newspaper declaring that the evidence of his guilt was conclusive, and so regarded by the public and officers of the court, and that he had been before tried for his life, it is not strange that the jury fell in with the supposed popular opinion and pronounced him "guilty."

The testimony of Dr. Graham, page 95 of the record, shows that he visited the deceased, Mullen, at about the hour of 9 o'clock a. m. on the day of his death, and that he died about the hour of 1 o'clock on that day. The testimony of the doctor further shows that the deceased was anxious as to his condition and asked the doctor touching it, to which the doctor replied: "The chances are all against you. I do not think there is any show for you at all," to which the deceased made no reply. It is further shown by the testimony of the doctor, page 97 of the record, that Mullen was at that time fully conscious.

It is submitted that in view of the character of the wound and of the anxiety of the deceased as to his condition, and the answer given him by the doctor in charge, his failure to make any reply or comment upon such answer, and the fact that he died within four or five hours thereafter, that it may rightfully be concluded that he was *in extremas*, and that declarations, if any, made by him at that time touching his assailant were competent to be shown under the rule.

It is submitted that the doctor should have been permitted to state what was said at that time, and in his presence by the deceased as to who his assailant was.

The doctor in answer to a question propounded to him, page 95 of the record, "Dr. did he or not make any statement to you, or in your presence, on that day after you had told him as to his physical condition, as to who it was or what his knowledge was as to who shot him?" answered, "yes, sir, he said he didn't have any knowledge of who shot him. I interrogated him about three times in regard to that, who did the shooting, and he did not know;" and in answer to the further question, page 95 of the record, "I will ask you Dr. whether or not you heard him after the time I spoke of and you told him as to his physical condition, make any statement as to who it was shot him, or as to what knowledge he had as to who shot him," answered, page 96 of the record, "He didn't know." This answer was not responsive to, and did not answer the question asked him; and having so answered, the court, pages 96, 97, and 109, held the answer conclusive as to the witness and upon the defendant. Now we submit the answer, that he didn't know who shot him, does not show absence of knowledge that the defendant did not do it. If the deceased was *in extremis*, then any declaration made by him as to who shot him, or who did not shoot him to Dr. Graham or Mrs. Hatch should have been permitted to be shown.

In support of the position that the deceased was at that time in *extremis*, we cite Greenleaf on Evidence, Sec. 158, and cases there cited, Wharton's Cr. Evidence, Sections 282, 283, 284 and 285.

J. W. Johnson and T. F. McMeehan
for Plaintiff in error.

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FILED.
OCT 10 1892
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1892.

CLYDE MATTOX, PLAINTIFF IN ERROR,
vs.
THE UNITED STATES.
} No. 1008.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

BRIEF FOR THE UNITED STATES.

WM. A. MAURY,
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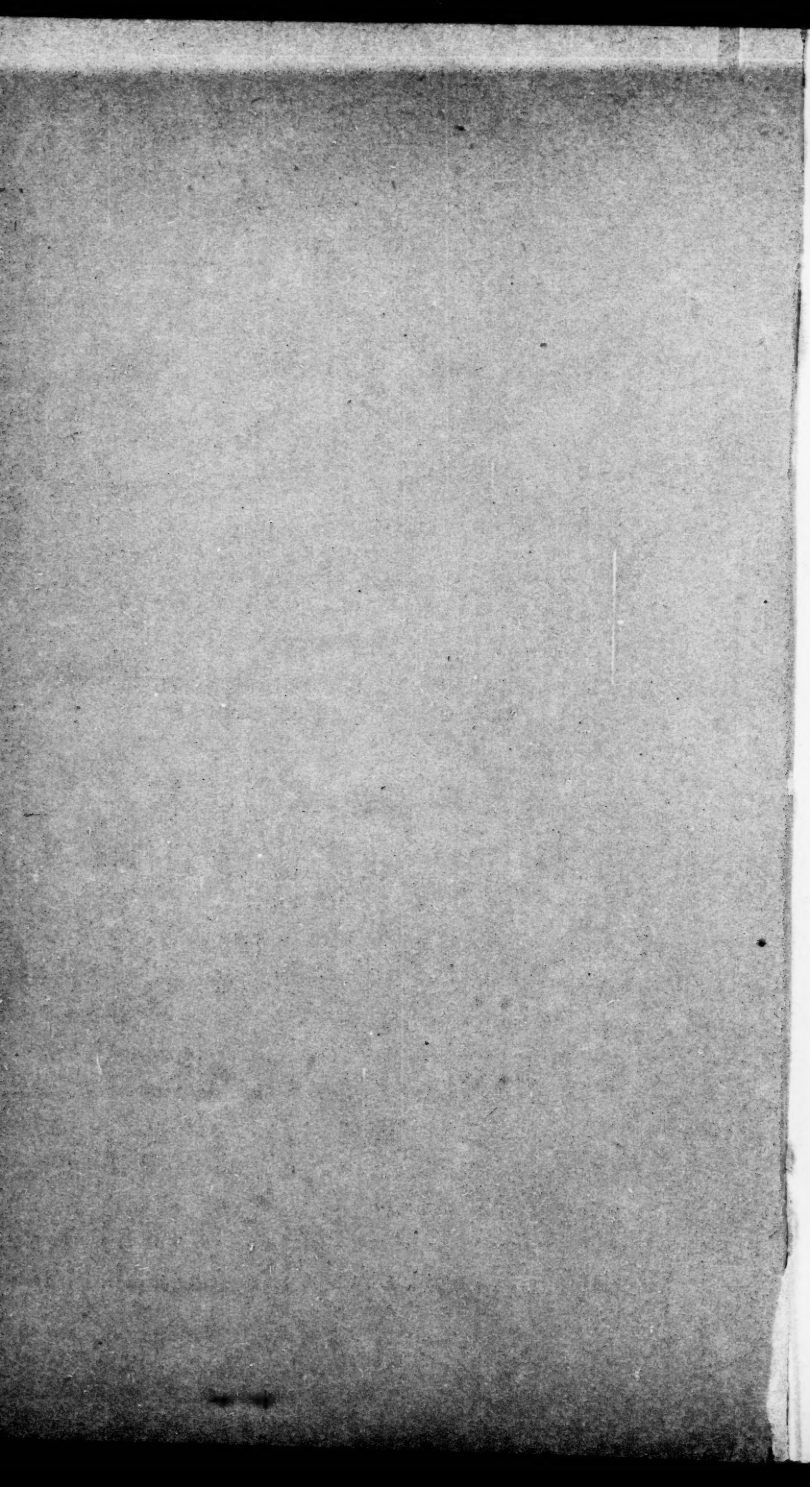

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This is an indictment for murder. The indictment contains three counts. (Rec., pp. 1–3.)

They charge that the plaintiff in error, Clyde Mattox, on or about December 12, 1889, in that part of Indian Territory acquired by the United States by the act of Congress approved March 2, 1889, and commonly known as Oklahoma, and being a part of the District of Kansas, did "feloniously, willfully, and of his malice aforethought," cause the death of one John Mullen by three several pistol-shot wounds.

The district court of the district of Kansas derived jurisdiction to try the offense charged in the indictment

from the act of Congress of January 6, 1883 (22 Stat., 400), section 2 of which provides as follows:

> That all that part of the Indian Territory lying north of the Canadian River and east of Texas and the one hundredth meridian not set apart and occupied by the Cherokee, Creek, and Seminole Indian tribes shall, from and after the passage of this act, be annexed to and constitute a part of the United States judicial district of Kansas; and the United States district courts at Wichita and Fort Scott, in the district of Kansas, shall have exclusive original jurisdiction of all offenses committed within the limits of the territory hereby annexed to said district of Kansas against any of the laws of the United States now or that may hereafter be operative therein.

This section was, indeed, repealed by section 9 of the act of May 2, 1890 (26 Stat. 91); but the section last mentioned contains the following saving clause:

> But all actions commenced in such courts, and crimes committed in said Territory, and in the Cherokee Outlet, prior to the passage of this act, shall be tried and prosecuted, and proceeded with until finally disposed of in the courts now having jurisdiction thereof, as if this act had not been passed.

By virtue of this provision the district court for the district of Kansas retained, after the repeal, exclusive jurisdiction of the offense charged in the indictment.

TRIAL AND VERDICT.

The accused was accordingly put on his trial on October 5, 1891 (p. 4), and on the 8th of the same month the jury found him "guilty as charged in the indictment." (P. 5.)

JUDGMENT.

On the next day, the judgment of the court was duly entered on the verdict, the motions for a new trial and in arrest of judgment having been previously overruled. (Pp. 8, 9.)

BILL OF EXCEPTIONS.

The bill of exceptions (pp. 9–122) presents a number of points, but we shall only give attention to those covered by the assignments of error. (Pp. 124 125.)

ARGUMENT.

I.

The first assignment of error relates to the rejection of the prisoner's offer to prove a statement or declaration of the deceased, John Mullen, made shortly before his death.

For that purpose the defense called Dr. Samuel Graham, the physician who attended Mullen after the shooting. The witness said that he told the deceased "The chances are all against you; I don't think there is any show for you at all." (P. 95.)

This was between 8 and 9 o'clock in the morning, and about 1 or 2 o'clock that day Mullen died. The witness then said that, after making the above statement, he interrogated Mullen about three times as to who shot him, and that he replied, "he didn't have any knowledge of who shot him" (P. 95.)

The question that elicited this testimony was not objected to by the counsel for the Government.

The counsel for the defense then asked the witness whether the deceased, after he had been told by the witness what his condition was, as above, made any statement to Mrs. Hatch "as to who it was shot him, or as to what knowledge he had as to who shot him." To this question

the counsel for the prosecution objected, stating, "It has not been proven that the party knew that death was impending." (P. 96.)

Then the following colloquy took place between the court and the counsel for the defense

Mr. JOHNSON. May I not show his statement as to who did the shooting?

By the COURT. The fact is that you know that you have not a proper foundation. Mr. Ady did not object and I allowed it. You have carried the matter thus far without objection, but I think——

Mr. JOHNSON. I am inclined to think that under a proper consideration of the rules I have not exceeded it. I know you have got to show that the party was in extreme—when I show that the physician who was doctoring the party tells him, as the doctor says he did, and that he died within four hours——

By the COURT. But the doctor didn't have much hope, but the question is what the man thought about it. These statements—you understand how rigid the rule is and the very great necessity for being rigid, taking the testimony of a man who is dead and can not testify.

Mr. JOHNSON. I agree with your honor as to the necessity of the rule. I want to submit this: It sometimes happens that the statement of a dying man is taken as when it is not shown and can not be shown that by any statement of his that he had any opinion as to his condition, but the books say, as I understand them, that if I can show by his physical condition at the time, the statement of his physician and the near decease of the party, if I can show enough to make it apparent that a reasonable man might believe and anticipate an early death, that that is sufficient. There is one thing I have left out; I have not asked the doctor whether this man was conscious; but I believe that in the rule laid down by Wharton that we are not required to show any statement of the party. I have not shown that he was conscious. I appreciate the rule and it is a very righteous one and ought to be rigid.

By the COURT. There is no question raised as to that. The fact is, the question has gone in and been answered without objection. You have asked the question inquiring of this witness whether or not he had a conversation with him and he said he did. I think he said he didn't know.

Mr. JOHNSON. Will you permit a suggestion? May I not prove the statement of this man made there at that time? We will assume, your honor, that I know A and know the parties C, D, E, F, and G. If A, B, and C struck me, I would know it; I know them; I saw the men who shot me, but I would not say I did not know who shot me. May I not prove the statement in this case?

By the COURT. I do not know the purpose. If you want to discuss, I will send the jury out. I will not permit you to impeach your own witness; he said he did not know.

Mr. JOHNSON. Will your honor——

By the COURT. I will not permit it.

Q. Doctor, what was John Mullin's condition at this time mentally as to whether he was conscious or unconscious?

A. He was perfectly conscious. He was in a normal condition as regards his mind.

Mr. Johnson submits the following question in writing to the court, which the witness is not permitted to answer, and which the court ordered incorporated into the record without the question going to jury:

Q. Did or did not John Mullin, in your presence and at that time, say in reply to a question of Mrs. Hatch, "I know your son Clyde Mattox, and he did not shoot me; I saw the parties who shot me and Clyde was not one of them." (Pp. 96, 97.)

The question, as thus propounded, was objected to by the prosecution, and the objection was sustained by the court, and thereupon the defense excepted. (P. 97.)

The offer to prove the alleged statement of the deceased to Mrs. Hatch, the mother of the accused, *came from the defense*, and it was incumbent on the party thus offering the evidence to show, satisfactorily, that it was admissible as a dying declaration and was not on the footing of mere hearsay. But Dr. Graham, the witness, was not asked whether the deceased had said or done anything that indicated that he regarded death as impending before or at the time the alleged declaration was made. Why some such question was not put, particularly after the remark of the court *that counsel knew he had not laid a proper foundation for the evidence*, and that the question was not what the doctor thought, but "*what the man thought about it*," is not readily perceived.

It is true that what the deceased said to the doctor about the shooting went in without objection, and without even the usual inquiries from the court as to the circumstances under which the statements were made,

but that was no reason why some other and different conversation between the deceased and *another person*, Mrs. Hatch, should have been admitted over the prosecution's objection.

The point we make is not that the deceased made no remark with reference to Dr. Graham's statement of his condition, but that he made no manifestation of any sort showing that he regarded himself as *in extremis*.

The mere fact that the physician told the deceased that "the chances are all against you; I don't think there is any show for you at all," shows, as the court remarked, that the "doctor didn't have much hope," but does not show that the deceased was without hope. It is never safe to conclude in such cases that the declarant believed death impending because his physician told him so. In *Rex* v. *Reany* (7 Cox, C. C., 209) the declaration was admitted, notwithstanding the declarant's statement that the surgeon had given him "some little hope," it being apparent that the declarant himself believed that the hand of death was upon him. So true is it, that the physician's opinion is alone not enough to warrant the admission or exclusion of evidence of this character.

Of this *Woodcock's Case* (1 Leach, 500) furnishes a rather striking example, for we find the surgeon in that case testifying that the declarant "Did not seem to be at all sensible of the danger of her situation, *dreadful as it appeared to all around* her." So, in *Van Butchell's Case* (3 C. & P., 631), the declarant rejected the hope held out by his physician, saying, "I feel that I have received such an injury in the bowel that I shall never recover."

It is not denied, as contended by the defense on the trial, that cases may occur where the condition of the declarant is such that we must conclude that he was under a sense of impending death when he made the declaration. Such a case was *Hill's Case* (2 Gratt., 594), the facts of which that seemed to compel the conclusion that the declarant believed death to be imminent were thus summarized by the court:

> And yet it seems to us impossible that any one can read the evidence in this cause without a thorough conviction that from the moment after he received the stab he knew it to be fatal. It penetrated the heart. It made him reel and stagger like a drunken man; fall, and faint. His limbs became cold. He was seized with vomiting. His eyes were sunken; his countenance pale and death-like. A clammy sweat exuded from him. The action of the heart, pierced as it was, and surrounded with clotted blood, was so feeble that it could not send the blood to the extremities, or even the surface of the body. In a warm night in September, with hot bricks at his feet, and covered with half a dozen quilts and blankets, he complained of cold. There was no pulse in the wrist. The supply of blood to the head was so scant that when it was raised much above a horizontal position, he fainted. His removal upstairs brought on convulsions; and there is good reason to believe that had he, at any time after his revival from the state of insensibility which followed the infliction of the wound, been placed in a perpendicular position, he would have instantly expired. Is it possible that all this could exist and he not know that death was grappling with him. The spectators all saw that death was upon him. The physicians, it is true, for a brief time, deceived by their probe, supposed the wound was superficial, and that he might recover; but *he* was not deceived. Upon being told that the physicians said the wound was slight, and that he would soon recover, he replied "it is deep! deep! deep!" His sensations told him it was deep, fatally deep. And how could it be otherwise, when it produced the effects above detailed.

See also *Donnelly* v. *State* (2 Dutcher, N. J., 498, 499), a case in which the late Mr. Justice Bradley bore a prominent part.

It is manifest, however, that the case at bar is no approach to Hill's case. According to the testimony of Dr. W. R. Thompson (p. 32), who made the autopsy, the

deceased had received three wounds, which the witness describes as follows:

> One was in the upper lobe of the right lung, entering about two or three inches above the right nipple, passing through the upper lobe of the right lung, fracturing one end of the fourth rib and fracturing one end of the fifth rib, passin' through and lodging beneath the skin on the right side beneath the shoulder blade; that was one wound. And another was in the upper portion of the left buttock, the second was in the right hip, passing through that opening in that bone (indicatin') and a portion of the ball lodged in front, passing through that opening and lodged; a portion of that ball was divided; we could not find the other portion of that ball. (P. 32.)

The witness also testified that he thought the deceased died of pneumonia, resulting from the wound in the upper lobe of the right lung (p. 33). He also said that the wound was "one that might prove fatal, *but not necessarily so*," and that there was "considerable pneumonia" existing at the time (p. 33). Turning again to Dr. Graham's testimony, we find (p. 97) that the deceased was, at the time he made his statement to the witness about the shooting, "perfectly conscious" and "in a normal condition as regards his mind."

In *Reg.* v. *Johnson*, cited in East's Pleas of the Crown, and cited by Mr. Finlason in vindication of himself against an imputation of Lord Ch. J. Cockburn in his controversy with Mr. Pitt Taylor over Bedingfield's case (Law Times for Feb. 21, 1880, and Whart. Crim. Ev., p. 199, ed. 1880), Lord Chief Justice Erle put this question: "How can I, from the fact that he was shot through the body, presume that he must have believed himself dying?" The same question might be aptly put in the case at bar.

In the much criticised case of *Bedingfield* (14 Cox C. C., 341), the Lord Chief Justice refused to allow a witness to

state what the deceased said while running from her house with her throat cut, directly after the event, either as belonging to the *res gestæ*, or as a dying declaration.

It is far from probable that the wounds received by the deceased induced the belief with him that his life was ebbing away. Indeed the real state of the case would appear to be that the deceased had his mind on the *disease* that had set in and *not on the wound*. In short, his condition was not such, it would seem, as to make him think that death was inevitable. As Coleridge J. said in *Rex* v. *Spilsbury* (7 C. and P., 187), we should expect to find the deceased, if he thought himself about to die, saying something of his affairs, or giving some directions as to his funeral, or as to where he wished to be buried, or taking leave of his friends, or the woman Laura Walker, with whom he lived, and in whose presence he was shot, while standing in the door of the house where they lived; but nothing of the kind fell from him or we should surely have heard of it from the witness stand. It would have been of too much moment to be omitted.

When it is considered that the Constitution of the United States guarantees that "in all criminal prosecutions the accused shall enjoy the right * * * to be confronted with the witnesses against him * * *" (sixth amendment), it would seem very clear that the duty of courts to reject declarations as to the cause of death, unless the proper conditions necessary to the admissibility of this exceptional sort of evidence are clearly shown, is more imperative under the Constitution than it was even at common law. Such evidence has weight with the jury,

and, no doubt, sometimes secures conviction, and being heard without the opportunity of cross-examination by the party convicted, its admission should be guarded with the most jealous care.

It is a species of evidence which is admitted from necessity and public policy, that the murderer may not always be able to secure impunity by destroying the only direct evidence of his guilt.

It has, therefore, been very properly said by Chief Justice Tindal (6 C. & P., 157), that "any hope of recovery, however slight, existing in the mind of the deceased at the time of the declaration being made, would undoubtedly render the evidence of such declarations inadmissible."

Who can say that in this case the deceased had no hope of recovery, "*however slight*", at the time of the supposed interrogation by Mrs. Hatch? All admit that this kind of evidence is exceedingly dangerous, and the authorities are clear that *the court must be satisfied that the declarant believed himself to be in extremis* before his declaration shall be permitted to go to the jury.

Considering then all the circumstances, and particularly that the wound was not necessarily mortal, the silence of the deceased as to his condition, and the absence of anything to show that he even took leave of the woman with whom he lived, and who testified in the case, it would be going quite far to say that he did not, at the time of the alleged conversation with Mrs. Hatch, entertain even so much as a slight hope of recovery.

But it may be properly questioned whether what it was

proposed to prove by Mrs. Hatch was a dying declaration within the rule, according to the test laid down by Chief Justice Abbott in *Rex* v. *Mead* (2 B. & C., 608), namely: "The general rule is that evidence of this description is only admissible where the death of the deceased is the subject of the charge *and the circumstances of the death the subject of the dying declaration.*" This statement of the principle received the emphatic approval of Ch. B. Pollock in *Reg.* v. *Hind* (8 Cox, C. C., 300), where he also said: "Speaking for myself, I must say that reception of this kind of evidence is clearly an anomalous exception in the law of England, which, I think, ought not to be extended" (pp. 301, 302).

Now it may be inquired how the leading question put by Mrs. Hatch, not to call forth evidence as to the "circumstances of the death" of John Mullen, but merely to induce him to state that her son, Clyde Mattox, the accused, was not the person who shot him, can be considered as suggesting a dying declaration in the accepted sense? The question could not have been put for the purpose of establishing the guilt of the murderer, because the deceased had stated already to Dr. Graham (p. 95) that he did not know who shot him, and this was his answer to three questions as to who fired the shots.

To be sure, where the deceased states the circumstances of his injuries and, at the same time, says anything that might help the accused, the latter may use it, taking all that was said together. What makes for the prisoner being inextricably blended with what makes against him, the *whole* that was said is an *entirety* and

must be admitted *in toto* or excluded *in toto*. As in the case of *Rex* v. *Scaife* (1 M. & Rob., 551), where the deceased said, "I don't think he would have struck me if I had not provoked him," which, it would seem, presupposed and referred to some previous statement in which he had declared the accused to be his assailant. But the learned judge (Coleridge) hesitated to allow the evidence and asked the counsel for the prisoner "if they could refer him to any case where the declarations of a dying man *in favor* of a prisoner had been received in evidence," to which counsel replied that they could not, although they had searched for such a case; but, afterwards, the learned judge admitted the evidence, observing that it might have an influence on the amount of punishment, the charge being manslaughter.

In *Moore* v. *State* (12 Ala., 767), the court said that dying declarations might be given in evidence to acquit as well as convict, and that "they are not limited as evidence in favor of the State alone;" but the case did not call for any such remark, for the statement of the deceased exonerating the accused, upon the offer of which the question arose, being contradictory to a former one inculpating him, was clearly admissible to discredit the deceased as a witness who had given inconsistent accounts of one and the same occurrence.

In *Moeck* v. *People* (100 Ill., 242), declarations exculpating a party from blame for the declarant's injuries were not allowed to go to the jury, although made while declarant was *in extremis*. The court said:

> It is next urged that the court erred in excluding the declarations of deceased, made shortly before his death, in substance that he struck

accused, and he was not to blame. They were made so long after the occurrence as to preclude all claim that they were a part of the *res gestæ*. They were, therefore, mere hearsay evidence, and were not admissible. Under the decision in the case of *Adams* v. *The People* (47 Ill., 376), they were not admissible as evidence. It was there said, the dying declarations of deceased, that "he did not wish accused hurt for what he had done, and that accused had done nearly right," etc., affords no evidence of anything more than a truly Christian spirit on the part of one who had been unjustly done to death, and who, in his dying agonies, was willing to forgive the malefactor. It is true that this was newly-discovered evidence on which a new trial was urged, but was said not to be evidence for the jury. (Pp. 244, 245.)

It will be observed that in both of these Illinois cases the declarations were in no sense accusations, but wholly excusatory or exculpatory.

It would seem that these cases proceeded on a safe principle. To allow such evidence to be received would be a temptation to the unscrupulous to wring from the dying victim some statement favorable to his assailant.

It would be a dangerous obstruction to the enforcement of criminal justice if those on trial for murder could shelter themselves behind such evidence, and we take leave to say that this court will never stretch the principle on which dying declarations are admitted.

But the question propounded to Mrs. Hatch was objectionable, also, because of its leading character, and properly ruled out on that ground alone.

II.

The remaining assignments of error, except the eighth, may be grouped together and disposed of under one principle.

These assignments are as follows:

Third. The said district court erred in overruling defendant's sixth and seventh grounds as alleged in defendant's motion for a new trial in

this, that it charged the misconduct of Douglas B. Donelly, the sworn bailiff, who had the jury in charge. Said misconduct consisted in this, to wit: That after the jury had been charged by the court, and after they had retired to consider of their verdict, and while they were deliberating on their verdict, the said bailiff made remarks in the presence and hearing of the jury to the great injury and prejudice of the said defendant, Clyde Mattox, said remarks being as follows:

"After you fellows get through with this case, it will be tried again down there. Thompson has poison in a bottle that them fellows tried to give him." And at another time said bailiff, referring to the defendant Clyde Mattox, in the presence and hearing of the jury and while they were deliberating of their verdict, said, "This is the third fellow he has killed." And in permitting the said jury, or some one of them, to purchase and take to the jury room a newspaper containing a comment upon the case upon which the jury was then deliberating (transcript, pages 117, 118). To which ruling the defendant, by his counsel, then and there excepted and still excepts.

Fourth. The said district court erred in overruling the defendant's eighth ground, as alleged in his motion for a new trial, which charges misconduct of the jury while they were deliberating of their verdict, and having read in their presence and hearing while so deliberating a newspaper known as the Wichita Daily Eagle, of the date of Thursday, October 8th, 1891, said paper containing a comment upon the case which was then being considered by said jury. To which ruling the defendant, by his counsel, then and there excepted and still excepts.

Fifth. That the court erred in excluding from consideration the affidavits of A. E. Snyder, J. A. Scandrett, and F. B. Hoyt, jurors, in support of the sixth and seventh grounds of defendant's motion for a new trial, which said grounds charged misconduct of the bailiff who had the jury in charge, and while they were deliberating on their verdict.

To which ruling of the court the defendant by his counsel then and there excepted (pp. 117, 118).

Sixth. The said district court erred in excluding the affidavits of F. B. Hoyt, A. E. Snyder, D. J. Davis, J. A. Scandrett, J. P. Hall, R. J. Harrin, and Samuel Booth, jurors, offered in support of the eighth ground as set out in defendant's motion for a new trial (p. 118), to which ruling the defendant then and there excepted.

Seventh. The said district court erred in overruling defendant's motion for new trial. To which ruling of the court the defendant then and there duly excepted and still excepts.

It will be observed that they are all founded on so much of the bill of exceptions as relates to the denial of the defendant's motion for a new trial and the several grounds thereof (pp. 116–122). But nothing is better settled than that the exercise of the trial judge's discretion in allowing or denying a motion for a new trial is not reviewable by this court by writ of error.

Say the court, in *Newcomb* v. *Wood* (97 U. S., 583, 584): "It has long been the established law in the courts of the United States that to grant or refuse a new trial rests in the sound discretion of the court to which the motion is addressed, and that the result *can not be made the subject of review upon a writ of error.*" (See also *Ins. Co.* v. *Barton*, 13 Wall., 604.)

A motion for a new trial, whatever be its technical merits, should never be allowed *against the real justice of the case.* It is because the determination of such a motion involves the exercise of a wide equitable discretion, and requires such an appreciation of the case as the judge before whom it was tried can, generally, alone possess, that the granting or denying of such a motion will not be reviewed by writ of error. A court of error could not, in many instances, be made to see the case as the trial judge saw it, and therefore could not, in such cases certainly, safely review his action.

It follows, therefore, that the alleged misconduct of the bailiff and jury can not be considered by this court. The decision of the judge below is final as to those questions. It may be that the irregularities complained of were estabblished as matters of fact, but it is not by any means to be inferred that the sources of justice were corrupted thereby. The court below having denied a new trial upon a survey of the whole case, it must be concluded that the justice of the case has been accomplished, notwithstanding the irregularities mentioned.

It is not necessary for us to contend here that this court could not reach an *abuse* of judicial discretion in denying

an application for a new trial—"an arbitrary *sic volo*," as a learned judge once said (8 Wend., 114), for it is not pretended that the trial judge practiced any tyranny. The several assignments of error relating to the application for a new trial and the petition for the writ of error (p. 23) merely aver "*error*" in the rulings below, and do not intimate *abuse* of judicial discretion.

It is not shown by the affidavits of the jurors, which the court refused to entertain (pp. 119, 120, 121), that the misconduct of the bailiff who had the jury in charge while deliberating on their verdict, or that of the jury themselves, had any effect on their deliberations. Indeed, we are not informed in the record what the bailiff meant by saying to the jury, "After you fellows get through with this case it will be tried again down there. Thompson has poison in a bottle that them fellows tried to give him," and, at another time, "This is the third fellow he has killed." To set aside the verdict on such expressions as these would have looked like trifling with justice. If the accused thought the bailiff's remarks were prejudicial to him by influencing the minds of the jury he should have shown in what way. To be sure, it is alleged that the bailiff remarked to the jury that "this is the third fellow he has killed," meaning, we are to *conjecture*, the accused; but one must have an exceedingly low estimate of a jury to be able to believe that they could have been influenced by a remark of that sort, supposing they understood it to refer to the accused.

It is some of the jurors themselves who tell us that the comments on the trial in the Wichita Daily Eagle

were read to the jury while deliberating as to their verdict, but they do not say that what was thus read had any effect on their minds. We can not believe that it had, because the case for the prosecution was made out too clearly to admit of doubt. The newspaper comment deals in assertion merely, and does not attempt to discuss the evidence. Indeed, it is decidedly favorable to the accused, because it states that "nobody saw him do the killing, and the evidence against him is purely circumstantial, but very strong, it is claimed, by those who heard all the testimony," whereas *the fact is* that several witnesses for the prosecution testified that they *saw the accused do the shooting.*

The question is not so much whether the irregularities mentioned existed, but whether upon a dispassionate view of the whole case any injustice has been done the accused; in a word, whether the evidence sustains the verdict to a degree that renders it safe to say that the misconduct complained of did not prejudice the accused. It is hard to understand how the accused could have been acquitted on the case made against him by the prosecution.

In the case of *Adams* v. *People* (47 Ill., 381), above cited, the court, in the exercise of appellate power as to new trials, refused to set aside a verdict and grant a new trial in a case very similar to the case at bar. In denying the motion the court used the following language:

> It may be the officers in charge of the jury were not sufficiently cautions and circumspect, when they conducted the jury to the hotel for refreshments, but it does not appear from the affidavits *pro* and *con*, read on this point, the jury were influenced in the slightest degree by the casual conversation they might have heard at the hotel, and it is not proved they heard anything prejudicial to the prisoner, or that they discussed

the merits before the cause was closed; and it is not shown that the jury were at any time separate and out of the control of the officer in charge. It certainly was the duty of the officers to keep the jury, when at their meals or sleeping, entirely removed from the company of others. They should eat by themselves, and sleep with none present but the officers in charge. (*Jumpertz* v. *The People*, 21 Ill., 406.) It was indiscreet, to permit them, during a meal or when in their lodging room, to be in company with others, but unless it is clearly shown they were, by such exposure, operated on in some way, to the prejudice of the prisoner, we do not think a verdict, for that cause alone, should be set aside. That, with other causes, would have weight, but of itself could not influence the judgment of the court to disturb a verdict, when, from the whole record, it appears justice was done.

We can not perceive that any rule of law has been violated by the circuit court to the prejudice of the prisoner. He has had a fair trial by a jury of his neighbors, and though we might not have found on the facts as they did, we can not say their finding is so against the evidence as to justify interference by this court.

The case of *Moeck* v. *People* (100 Ill., 242, 246) may be cited also for the same purpose.

It being clear that the judge below was not guilty of an abuse of discretion in denying the motion for a new trial, it is quite unnecessary to inquire whether the affidavits of the jurors rejected by the court were admissible. Should, however, that question be to be determined, the court will be glad to have a reference to the valuable opinion of the supreme court of Kansas, in the case of *Perry* v. *Bailey* (12 Kans., 540), delivered by Mr. Justice Brewer, then a judge of that court.

THE MOTION IN ARREST OF JUDGMENT.

The eighth assignment (p. 125) is for supposed error in overruling the motion in arrest of judgment (p. 122).

That motion was based on the following grounds:

1st. Because the court has no jurisdiction of the cause of action.

2d. Because the grand jury had no legal authority to inquire into the offenses charged, for the reason that it was not within the jurisdiction of the court.

3d. That the facts stated in the indictment do not constitute a public offense.

The act of Congress giving jurisdiction to the district court of the district of Kansas was undoubtedly constitutional, since offenses committed against the United States in the Territories do not come within the sixth amendment of the Constitution guaranteeing to the accused "the right to a speedy and public trial by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law," but come within paragraph 3 of section 2, article 3, which provides that the trial of crimes not committed within any State "shall be at such place or places as the Congress may by law have directed." This has been firmly settled. *United States* v. *Dawson* (15 How., 467), *United States* v. *Jackalow* (1 Black, 484).

The court below, in its charge to the jury (p. 112), states that "there is no controversy in this case as to the fact that the place in which the offense is alleged to have been committed was a place within the exclusive jurisdiction of the United States, and within the jurisdiction of this court, if you find the place to be the place mentioned in the indictment." That the offense is proved to have been committed at the place named in the indictment does not admit of question, if questionable here. It would therefore be a waste of time to dwell longer on this assignment of error.

It is respectfully submitted that the record does not seem to warrant a reversal of the judgment.

WM. A. MAURY,
Assistant Attorney-General.

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146 U.S. 153
987 +c

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1891.

EDWARD ROBY

vs.

CHARLES W. COLEHOUR ET AL.

Four Cases Numbered 1466, 1467, 1468, 1469.

PLEADINGS, DECREE

AND ABSTRACT OF PROCEEDINGS IN BANKRUPTCY.

JOHN M. PALMER,
COUNSEL.

6 BILL.

Filed January 30, 1890.
General No. 78,917. Term No. 4,788. Chancery.

7 STATE OF ILLINOIS, } ss. In Circuit Court of Cook
COOK COUNTY. } County. In Chancery.

To the Honorable Judges of said Court in Chancery Sitting:

Your orator, Charles W. Colehour, brings this his bill in Chancery against Edward Roby and William H. Colehour and alleges,

First: That in the year 1871 he was engaged in the real estate business in Chicago, and that his brother, William H. Colehour, was interested with him in certain parts or branches of the same.

Second: That in the early Summer of the same year he negotiated with Henry F. Clarke, who represented his brothers and sisters, who were then the owners of the following described lands, situated in the county of Cook and State of Illinois, to wit:

8 Here follows description by metes and bounds above given of S. ½ and part N. E. frl. ¼ Sec. 8, T. 37, R. 15, except Rail Roads (261.22 acres); also N. E. ¾ of Sec.
9 17, T. 37, R. 15, Cook County, containing in all 406 acres, for the purchase of the same; and that an agreement was concluded by which said Clarkes by warranty deed dated July 18th, 1871, conveyed to William H. Colehour the said land for the consideration of $100,000.00; $10,000.00 was paid in cash, a mortgage of $4,000.00 upon said property running to Mary P. M. Palmer, was assumed by William H. Colehour; and he gave his notes for the sum of $86,000.00, bearing seven per cent. interest, payable semi-annually, payable on or before one, two, three, four and five years respectively, and secured the same by a trust deed conveying said lands to V. C. Turner; said trust deed containing the usual covenants, with power of sale in case of the non-payment of said notes, or any part of them, at maturity.

Third: That at the time of said purchase, William Hansbrough furnished $5,000.00 of the cash payment made on said purchase to the Clarkes, Francis Corby, Wesley Morril and your orator furnished in equal propor-

tions the remaining $5,000.00; and it was then and there agreed between said William H. Colehour, Morril, Corby, Hansbrough and your orator that William H. Colehour should hold the title to said lands, one-half for said Hansbrough, one-sixth for said Corby, one-sixth for said Morril, and one-sixth for your orator; said interest to be in the profits resulting from the sale of the said lands, and not in the land.

10 *Fourth:* That shortly after the great fire of October, 1871, the said Morril and Corby renounced all their interest in said land, and by proper instrument in writing conveyed the same to your orator.

Fifth: That on the 16th day of August, 1873, the said William H. Colehour bought the interest of said Hansbrough in said land, and gave him therefor his note for $15,066.47, secured by trust deed running to Levi D. Boone upon the North-east three-fourths of Section 17, T. Thirty-seven, Range Fifteen (15), being part of said land deeded by the Clarkes to William H. Colehour.

Sixth: That owing to the stringency of money in the years 1872 and 1873, and inability to sell and convert property into money, neither of the owners of said lands were able to pay the interest maturing on the said Clarke notes; and the said V. C. Turner advertised said lands for sale, under the trust deed given to secure the said Clarke notes, on the ——— day of ——— 1873.

Seventh: That shortly after said advertisement, and before the said day fixed by it for the sale of said land, said defendant Roby, who had been before acting as the attorney of said Clarkes, came to your orator and proposed to him to act as his and William H. Colehour's attorney in protecting said land from sale under said trust deed, and to take care of and to protect said land against any foreclosure proceedings that might be instituted by

11 said Clarke or Turner, and offered to act as attorney to William H. Colehour and your orator in this matter, until the entire indebtedness against the said land should be paid or removed, for one-fourth of what might be saved on the final sale of said land, after the payment of all debts, taxes and advances made on account of the same; and your orator and William H. Colehour assented to

the proposition of said Roby. This arrangement with said Roby was made pending the negotiations for the purchase of said Hansbrough's interest by your orator and William H. Colehour, and was finally consummated after said purchase.

Eighth: That at the time of said arrangement with said Roby, it was agreed that your orator should have sole management, charge and sale of the said property, and that Roby should attend to all legal matters in regard to the same, and that your orator should receive for managing the said property, the sum of $5,000.00 per year, and that upon final sale of the property, all advances made for the payment of the debts, taxes, incumbrances or liens against said property, was paid, the net proceeds should be divided into three parts, one-half to belong to your orator, one-fourth to said Roby, and one-fourth to William H. Colehour.

Ninth: That on the 29th day of May, A. D. 1873, and before the arrangement with the said Roby, the said William H. Colehour made, executed and delivered to your orator, the following instrument, to wit:

POWER OF ATTORNEY DATED MAY 29, 1873,

Wm. H. Colehour to Charles W. Colehour.

12 "Know all men by these presents, that I have and by these presents, do hereby make, constitute and appoint Chas. W. Colehour my true and lawful attorney, in fact for me and in my place and stead to take the possession, sole control and charge of and over the following described land, to wit: (This instrument contains a description of all said lands conveyed by said Clarks to Wm. H. Colehour). Over all of which land I give my said attorney absolute power and control; to lay out in lots, blocks and streets; to donate portions thereof to persons or corporations for locations for manufacturing purposes; to subscribe for the stock of any company, pay for the same, and charge the same to me; to make all sales of land in lots or blocks; make deeds in my name, and

acknowledge them for me; to receive all money and notes for any deferred payments and collect the same; to act as trustee in all trust deeds, receiving all notes; to borrow money when required, and pledge said notes; to pay all taxes and assessments; to pay off any and all incumbrances of mine, all debts of mine, all notes he may give, for any purposes; to bid in his own name any property sold under pledge of security of mine; to buy up all judgments against me; to employ any lawyer for any of my law business; and pay him to begin any suit; defend any suit for me; to dismiss any of my suits or defenses at his option; to settle any suits; and when the Clarke mortgage for
13 $86,000, and the Palmer mortgage for $4,000, and all other of my indebtedness now existing or which may hereafter come into existence, are fully paid and the land free of all charges, then this power shall cease.

I hereby agree to pay him out of the proceeds of sales of land, the sum of $5,000,00 each year from the date hereof, for his services, and his power of attorney is made continuous and irrevocable, until such time as the land is free and clear, and until my said attorney is paid all sums he has advanced, and his salary is fully paid.

Hereby ratifying and confirming all my said attorney may do in my behalf, I hereby set my hand and seal this 29th day of May, 1873.

WILLIAM H. COLEHOUR. [SEAL.]

Certificate of Acknowledgment attached, dated June 2, 1875, and signed *Charles G. Harris*, Notary Public.

14 *Tenth:* At the time of the said arrangement with the said Roby, said paper was shown to him, as being then in full force and effect, and he consented to it, and approved the same, and took his said interest subject thereto.

That on the 16th day of August, 1873, in order that the rights of the parties might be fixed and determined in said land, the following instrument was made and executed by William H. Colehour, and delivered to your orator, to be kept for the benefit of the parties interested in said land, to wit:

DECLARATION OF TRUST, DATED AUGUST 16, 1873.

KNOW ALL MEN *by these presents* that I, William H. Colehour, a bachelor, being the owner in fee simple of the land in the South Half of Section Eight (8), and the North Three Quarters of East Half of Section Seventeen (17), all in Town Thirty-Seven (37), N., R. Fifteen (15), East of the Third P. M., Cook County, Illinois, more particularly described in deed dated July 18th, 1871, made by Robert D., Henry, Sarah J. and Harriet S. Clarke to me, which land is *subject to an incumbrance* of $85,000.00 to said Clarkes, and $4,000.00 to Mary Palmer, and other sums due on account of said lands, *do hereby declare* that Charles W. Colehour shall be entitled to the one-half of said land, or the profits to be realized out of it, after the above debts are fully paid, and all other necessary sums of money hereafter required, shall be fully paid, and Edward Roby shall be entitled to the one quarter of land, or profits thereof, when all debts against said land hereafter have been fully paid.

I reserve the right to handle the land as I please, without interference from Chas. W. Colehour and Edward Roby.

And should either of them seek to acquire any interest in the lands before it is fully paid for, he shall forfeit the interest he is above to be entitled to by the terms of this declaration.

The power of attorney heretofore given to Charles W. Colehour shall remain in full force.

The sole consideration for the interest of said Roby as above named, grows out of his services as attorney to be rendered me as I require the same, until the land is fully cleared of all debts of every nature.

The terms of this trust cannot be changed.

Charles W. Colehour shall be my successor in this trust, after him, Edward Roby shall be Trustee if Charles W. Colehour shall give up the Trust.

I reserve the right to act as Trustee, however, during my pleasure.

In witness hereof, I have hereunto set my hand and seal, this 16th day of August, 1873.

WILLIAM H. COLEHOUR. [SEAL.]

I have this day, August 16th, 1873, given to Hansbrough, for his interest in said lands, my notes for $15,066.47, and taken up my contract with him.

16 Certificate of acknowledgment attached dated August 13, 1875, and signed Charles G. Harris, Notary Public.

17 Certificate of recording endorsed, shows the instrument recorded July 14, 1888.

That said declaration of trust was assented to and accepted by said Roby, and, from that day to this, your orator acted under said instrument and accepted the same as the sole agreement in defining the interest of the parties in said land.

Eleventh: That, in December, 1873, your orator caused the South half of said Section Eight to be subdivided and platted into Blocks and Lots, the lots being about 2,000 in number; and that, in the years 1873 and 1874, he caused to be thrown up and graded about fifteen miles of streets; and ditches, draining said land, to be dug, about three miles in length; and caused bridges to be built across the Calumet river, connecting said subdivision with the streets leading to Chicago; that he caused a large amount of sidewalks to be built, fronting said lots; and devoted his entire time to the improvement of said property,

18 generally, and the sale of lots in said subdivision.

Twelfth: That, from the spring of 1872 to the year 1879, your orator had the sole charge of said land and all improvements thereon, and since the last date and to the present time, he has had possession of said land, except the lots conveyed to actual purchasers, fenced the unsold portions, and expended, out of his own pocket, large sums of money thereon, caused a depot to be erected on said land, school-houses to be built, he living with his family on said land, from 1875 to 1889, and doing all in his power to advance its interests.

Thirteenth: That during said year, from 1873 to 1878, inclusive, your orator was engaged in making im-

provements, and in the sale of said lots in said subdivision, and had an office in Chicago and one on the said land; that said Roby, during all of said time, was daily cognizant of what was being done, that he, from week to week and from day to day, knew the amount of money which was received from the sale of lots and what was done with every dollar of it; that a large amount was expended in improvements, all of which was known to and approved by said Roby; and that your orator never, in any year, received from the moneys received from said sales of lots, for his personal use, over the sum of $1,500, and some years not that.

19 *Fourteenth:* That prior to the month of , 1878, your orator had an arrangement with the Clarkes, by which lots were released from the lien of said Turner Trust deed, as they were sold, a certain sum being paid to said Clarkes upon each lot released; that during said month of , 1878, said Clarkes refused to grant any further releases, which prevented the further sale of lots.

Fifteenth: That in October, 1881, the said Clarkes filed a bill in chancery, in the Circuit court of Cook county, to foreclose said Turner's trust deed.

Sixteenth: That said Roby, at the time the said arrangement was made with him for one quarter of the net profits of said land, assured your orator, and said William H. Colehour that he knew certain facts which would prevent the foreclosure of said Turner's trust deed, and when said bill was filed again assured your orator and said William H. Colehour that he could defeat said foreclosure suit.

Seventeenth: That about this time the said Roby, as your orator is informed, and believes, conceived the design of taking advantage of the confidential position he held as an attorney and pretended friend of your orator and William H. Colehour, and of their financial position, and to get control of said property, and cheat and defraud them out of their rights in the property, although for a long time thereafter, he pretended to act with and for the

20 interest of your orator and said William H. Colehour.

HORTON JUDGMENT.

Eighteenth: That in September, 1878, a judgment was recovered against your orator and said William H. Colehour, in the Superior court of Cook county, for $4,113.58 and costs, in favor of O. H. Horton, receiver of German Savings Bank, and that the debt on which said judgment was recovered was contracted to raise money to pay, and which was paid, on said Clarke's indebtedness, which was well known to said Roby.

LANDIS TITLE.

That execution was issued on said judgment and levied on the following described lots, to wit:

Lots 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46 and 47 of..... Block 15;
Lots 22 and 23 of..... Block 18;
All (except lot 32)..... Block 19;
All..... Block 22;
Lots 17, 18, 19, 20, 21, 22, 23 and 24 of..... Block 26;
Lots 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23 and
21 24 in..... Block 36;
of Ironworkers' Addition to South Chicago: A subdivision of S. ½, Sec. 8, T. 37, R. 15 aforesaid;
Also the N. E. ¾ of Sec. 17, T. 37, R. 15.

Which were by the sheriff sold to Roland R. Landis;
And a deed was made and delivered to said Landis November 1st, 1883.

ROBY PURCHASED FROM LANDIS.

Said Roby at the time had in his possession notes belonging to your orator and his said brother to the amount, as your orator believes, of $20,000, and represented to them that he could buy said Landis' title to said lots very cheap, as they were subject to the lien of said Turner's trust deed, and offered to trade for the same, the best he

could, then saying that he could do better, probably, by buying said lots in his name than in the name of William H. Colehour or your orator, and he would hold the title in trust for all three under the same trust it had formerly been held by said William H. Colehour. Your orator further says that said Roby did buy up said Landis' title and had the same deeded to him by deed recorded in
22 recorder's office of Cook county on the 6th day of June, 1884, in Book number 1,249, page 527, the consideration expressed in said deed being $600.

And your orator alleges the fact to be, that said Roby only paid for the same the sum of about $200; that he now, since January 15, 1889, contrary to equity and justice, claims that he is the absolute owner of said lots, as against your orator and William H. Colehour.

JUDGMENT:
McCOY *v.* CHARLES W. COLEHOUR.

Nineteenth. That at the June term of the Superior court of Cook county, 1878, a judgment was recovered against your orator in favor of Charles B. McCoy, for the use of Frank W. Harding, for the sum of $3,700 and costs.

That execution was issued on said judgment and delivered to the sheriff of Cook county, who levied the same on the following described lands, to wit:

The N. ¾ E. frl. ½; also, W. ½ N. W. ¼ Sec. 17; also the S. ½ Sec. 8 (except lots 8, 9, 10, 11, block 8 of Ironworkers' Add).

That part of the north half of said section eight (8) lying east of the line drawn from a point where the south line of said north half of said section intersects a line drawn through the middle of the right of way of the Lake Shore and Michigan Southern Railroad land, north
23 twenty degrees east, to Lake Michigan.

All of said premises being in T. 39 N., R. 15 E. 3d P. M., and situate in the County of Cook and State of Illinois;

And duly advertised and *sold the same on the 23rd of May, 1885, to George F. Harding* for the sum of $500.00, and that a deed for the same was duly issued to him.

That said Roby informed your orator and said William H. Colehour that he had got said George F. Harding to buy in the said lots, and hold the same for the benefit of your orator, said William H. Colehour and himself, and to be deeded when said debt to said Frank W. Harding was settled.

That afterwards, and during the year 1888, the said Frank W. Harding was fully paid, at the request of your orator, out of moneys received from a sale of part of said Trust property, with full knowledge and consent, and in the presence of said Roby.

HARDING CONVEYED TO ROBY.

That on the eighth day of February, 1888, said George F. Harding, at the request of said Roby, deeded to said Roby said lots and lands,

And your orator alleges that said Roby now, contrary to equity and justice, claims to own the same, absolutely, as against your orator and the said William H. Colehour.

JUDGMENT.
CRANE BROS. M'F'G CO. v. CHAS. W. AND WM. H. COLEHOUR.

Twentieth: That on or about the 24th day of September, 1879, a judgment was recovered in the Superior Court of Cook Coun.y, against your orator, and William H. Colehour, in favor of the Crane Brothers Manufacturing Company, for the sum of $3,591.00.

24 That execution was issued thereon, and placed in the hands of the Sheriff of Cook County, who levied the same upon the following described lands: to wit: the following described tracts or lots or blocks or parcels of land, situated and being in Ironworkers' Addition to South Chicago a subdivision of the South fractional Half of fractional Section Eight (8), in Township Thirty-Seven (37), North, Range Fifteen (15), East of the Third Principal Meridian in Cook County, State of Illinois, to wit:

Lots 4, 5, 6, 7, 8, 9, 10, 11, 12, 13 and 14, of. Block 2;
Lots 2, 3, 4, 7, 8, 9, 10, 11, of..... Block 5;
Lot 9 of..... Block 8;

Lots 5, 6, 7, 8, 9, 13, 14, 43, 44, 45, and 46 of. Block 10;
Lots 40, 41 and 44 of..... ..... Block 11;
Lots 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 18, 19, 20, 21, 22, 23, 24 and 48 of..... Block 15;
Lots 7, 8, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47 and 48 of..... Block 16;
Lots 1, 2, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 38, 39, 40 and 41 of..... Block 17;
Lots 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 24, 25, 26, 27, 28, 29, 30, 31, 32 and 33 in..... Block 18;
Lot 31 of..... Block 20;
Lots 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 33, 32, 34, 35, 36, 37, 38, 39 and 40 of.... Block 22;
Lots 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 61,
25 17, 18, 19, 20, 21, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47 and 48 of..... Block 25;
Lots 25, 26, 27, 28, 29, 30, 31, 32 and 33 of.. Block 26;
Lots 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 29, 30, 31, 32, 38, 39 and 43 of..... Block 27;
Lots 5, 6 and 7 of..... Block 28;
Lots 5, 6, 7, 8, 21, 22 and 35 of..... Block 29;
Lots 8, 17, 18, 19, 20, 25, 26, 34, 45, 46, 47 and 48 of..... Block 30;
Lots 1, 2, 8, 15, 16, 17, 21, 22, 23, 24, 25, 26, 27, 28, 29, 40, 41 and 47 of..... Block 33;
Lots 7, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 39, 42, 43 and 44 of.... Block 34;
Lots 6, 13, 20, 21, 22, 25, 26, 27, 28, 29, 30, 35, 42, 43 and 44 of..... Block 35;
Lots 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45 and 46 of..... Block 36;
Lots 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39 and 40 of..... Block 38;

All..... Block 39;
All..... Block 40;
Lots 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47 and 48 of. Block 41.

All that certain strip or parcel of land laid out upon the plat of said Ironworkers' Addition, and thereon designated as private property, reserved for railroad purposes, except such parts thereof as are parts of blocks 19 and 22 of
26 said Ironworkers' Addition.

SALE TO ROBY.

Which lots and lands were by said sheriff duly advertised for sale, and sold to said Roby on the 14th day of September, 1886.

That prior to said sale the said Roby, at the request of your orator, bought said judgment and paid therefor the sum of $750.00, of which your orator paid $250.00; and it was then agreed between your orator and said Roby that said Roby should hold the same for the benefit of the Trustee of said land; and when said judgment was so bought, by said Roby, it was agreed, that if a sale should afterwards be made under said judgment, said Roby should purchase said lands and hold the same as trustee as provided in said Declaration of Trust, dated August 16th, 1873; and said Roby then and there agreed with your orator so to do; and your orator says that said Roby never pretended to hold said last mentioned lands except as trustee as aforesaid, until the year 1890; but he now claims to hold the same for his own sole use and benefit, and denies that your orator and said William H. Colehour have any interest in the same.

Averment of DEED.
WILLIAM H. to CHARLES W. COLEHOUR.

Twenty-first: That on or about the 1st day of May 1879, said Roby was not satisfied with said William H. Colehour and not willing that he should act as trustee, claiming that he had not the requisite experience and ability and standing, that as the whole management of
27 said property was being conducted by your orator, he ought to act as trustee instead of William H. Colehour, and suggested that William H. Colehour deed said land to your orator, that your orator suggested said Roby's wishes in the premises to said William H. Colehour; and that William H. Colehour made, executed and delivered to your orator a deed conveying to him the legal title to said land; that said Roby advised that it better not be at that time recorded, and that your orator held the said deed and forgot that it was not recorded, and supposed it was until he learned it had not been, on or about the 14th day of July 1888, when he recorded the same. But your orator says that said Roby well knew of the execution and delivery of said deed, and approved of the same; and that from its date your orator acted as the trustee of said land in place of said William H. Colehour; and that your orator took possession of the same except so far as it had been sold, and fenced nearly all of the unsold portions of the same, and has held possession of the same to the present time.

Averment of DEED:
WILLIAM H. COLEHOUR to ROBY.
And Attack on that Deed.

That said Roby not content with the injury done to and the said frauds perpetrated upon your orator and the said William H. Colehour, and with the intent, and contriving to cheat and defraud them out of their just rights in said first described land, on or about the 1st day of January, 1887, went to Richard D. Lender who was a mutual friend of said William H. Colehour and said Roby, and who had been connected with the said property as agent

28 from the time it was subdivided and was familiar with the history and sales made in said subdivision; and represented to him, that he had by sales on judgments got control of and owned your orator's interest in all of said first described lands; that William A. Montgomery, the attorney of the said Clarkes, in the suit brought to foreclose the Turner Trust deed, would have nothing to do with your orator; that it was absolutely necessary, that all the interests in said land adverse to said foreclosure, should be got under one control; and that if he could get that, he could settle with Mr. Montgomery, and close up the said litigation; that he could and would protect the interests of every one, owning any interest therein, and see that they got their rights; and asked said Lender to see William H. Colehour, and induce him to deed his interest in said land to said Roby, without the knowledge of your orator; that said Lender believing said Roby, and believing that it was for the interest of all concerned, that said matters should be settled, and believing that said Roby was acting in good faith, went to said William H. Colehour, told him what Roby had said, and induced said William H. Colehour to meet said Roby.

They met at an appointed place, and Roby told William H. Colehour in substance what he had told Lender, and that he had obtained your orator's title by execution sales;
29 that Charles W. Colehour had lost all his interest in said land. Said William H. Colehour then told said Roby, he would do nothing to interfere with his said brother's rights; that Roby then told said William H. Colehour that his brother's rights should be protected, that he should have his one-half,—all he was entitled to; that the only way to get anything out of the land was to get the entire title in him, the said Roby; and that he could then settle the foreclosure suit with said Montgomery; that unless that was done, everything would be lost.

Said William H. Colehour seemed reluctant to make a deed to said Roby, and said Roby then told him he could get nothing in any other way; that he held control of the title of the lot and house in which said William H. Colehour lived, and that if he did not do as he, Roby, wished he would put him out in the street in three days; that said Lender, believing said Roby told the truth, and believing

it was for the best interests of William H. Colehour to do as Roby requested, strongly urged said William H. Colehour to deed his title in said land to said Roby; and said William H. Colehour, believing said Roby and said Lender's statements, and being unfriendly to your orator, without your orator's knowledge, consented so to do.

That said Roby then produced a deed which was finely
30 written, which he read to said William H. Colehour and to said Lender, and which said William H. Colehour, believing was correctly read, signed, and caused his wife to sign; and acknowledged and delivered the same to said Roby, secretly, and without the knowledge of your orator. But your orator alleges that the said representations of said Roby were false and fraudulent; that he had not then by sales and judgments got the control of, and did not own your orator's interest in said land, but on the contrary held whatever title he had so acquired in trust for your orator and said William H. Colehour; that it was not true that said Montgomery would have nothing to do with your orator, and that if he could get control of the interests in said land, he would settle with Montgomery; that it was not true that said Roby held the legal title to the house and lot on which said William H. Colehour lived, and that said Roby wilfully represented to said William H. Colehour that he would protect the rights of your orator, when he was deliberately attempting to defraud and cheat him out of his rights.

That said Roby assured said William Colehour and his wife, that said deed only conveyed said William H. Colehour's one-quarter, and so read said deed, (neither said William H. Colehour nor his wife reading the same) when in fact it conveyed the interest of your orator.

Twenty-second: Your orator further shows unto your
31 Honor that after the said Clarkes refused to give releases on the lots sold, the said William H. Colehour, your orator, and the said Roby got together, and most carefully and minutely examined all the books and accounts, showing sales of lots and the disbursement of moneys received therefrom; that the said Roby then had in hand, notes and securities belonging to said trust, amounting to at least Fifteen Thousand Dollars, and that it was then agreed between said William H. Colehour, your orator,

and said Roby, that matters between them should be considered square, that neither owed to either or both the others anything, and that said Roby should hold, collect and account for said notes and securities.

And he further says, that since that time, your orator has paid out and expended more than twice as much money in caring for and protecting said property, as said Roby has paid in the purchase of the said executions or the lots sold thereunder, and that said Roby has rendered no account of the notes and securities thus held by him.

Twenty-third: That in 1886, said Roby, acting as the attorney of your orator and William H. Colehour, advised the commencement of a suit of Forcible Detainer by said William H. Colehour, against one John Thurman; who was then, as your orator believed, in the wrongful possession of a part of said land, to recover possession of the same; that said suit was commenced, and judgment recovered in the same; that a writ of restitution was
32 issued and delivered to a constable to execute, and that in the execution of the same, he committed certain irregularities; for which the wife of said Thurman brought suit in the Superior court of Cook county, and recovered a judgment against said constable, your orator and said William H. Colehour, for the sum of $1,500.00 and costs; which is now a lien upon the interest of your orator and said William H. Colehour in said lands. But your orator says that at the time of the recovery of said judgment, said Roby agreed, that as said judgment had resulted from an attempt to recover possession of said land, by proceedings advised by him, and as said Forcible Detainer suit was brought for the benefit of all interested therein, to pay one-quarter of the same.

That your orator has from the date of his first arrangement with said Roby, and from the date of the said declaration of trust of August 16, 1873, in all respects, and to the best of his ability, honestly endeavored to carry out, and promote the best interests of the equitable owners of said land; and that said Roby, taking advantage of your orator's financial position and confidential relations, as his attorney, resulting from his position with your orator, misled, and induced him to consent to said execution sales, your orator believing that said Roby would in good faith, carry out his said promises and agreements.

33 *Twenty-fourth:* Your orator alleges and charges the fact to be, that the said Roby has not carried out his said agreement with your orator, on which his rights, if any, in said land, are based; that he has not in good faith defended said foreclosure suit, and endeavored to protect the rights of your orator and said William H. Colehour in said land; but contrary to his said agreements and his obligations as the attorney of your orator and said William H. Colehour, and in violation of his duty as one jointly interested with your orator and William H. Colehour in said land, has deliberately and intentionally, and by fraud as aforesaid, attempted to deprive them of their said rights in said land, and hence has forfeited all his rights, title and interest therein, and holds his said titles so acquired by him as the trustee of your orator and said William H. Colehour.

Twenty-fifth: That from the year 1873 until latter part of 1889, he had believed that said Roby was working with him in good faith to carry out the original intentions entertained by your orator, said Roby and William H. Colehour to defend said foreclosure suit, and protect said property, and to protect the equity of redemption therein, and sell and dispose of the same to the best advantage and divide the net proceeds, one-half to your orator, one-quarter each to Roby and William H. Colehour; but your orator alleges that said Roby now claims that neither your
34 orator nor the said William H. Colehour has any right, title or interest in said property, and claims the same as his own, subject only to the amount due thereon to the said Clarkes; and, to defraud and injure your orator, *has filed his three bills in this court*, to compel your orator and James E. Clarke and Jared M. Clarke, who hold the title to portions of said land for the use of the legal owners thereof, to deed said portions of land to him. But your orator says that the said Clarkes have deeded to him the titles conveyed to them, and that he holds the same subject to the order of this court.

Twenty-sixth: That a large part of said first described land was on December 30th, 1889, sold by decree of this court in said foreclosure proceedings; and that the master of this court was by the court directed to proceed with said sale, and sell sufficient of the remainder to make the

amount due the said Clarkes; and that the said master did on the 29th day of January, 1890, sell the remainder of said lands covered by the decree on said foreclosure suit; and which includes all the land covered by said Clarke mortgage, in which your orator, said William H. Colehour or said Roby have any interest.

That each of said lots were sold separately, and that the unsubdivided portions of said lands were sold in tracts, so that any lot or part of the same can be redeemed as it is sold; that none of said lots or tracts sold for one-half of what they can be sold for by a receiver to be appointed
35 by this court. And your orator says that the condition of the title is such that the equity of redemption cannot be sold as your orator believes, for one-tenth of its real value, if it can be sold at all; that if a good title to said property could be furnished, it would readily sell for from $200,000 to $250,000 over and above the amount due on said Clarke mortgage; and that if a receiver should by this court be appointed, and said Roby and your orator, and said William H. Colehour, be ordered to deed the titles they control to such receiver; he could, by redeeming from said sale give a perfect title to the same, and if directed to sell the same, and hold the avails to abide the decree of this court, a large amount can be realized. But if that is not done, your orator verily believes, that a title cannot be made that will enable said property to be sold before the expiration of the equity of redemption from said master's sale, and your orator offers to deed and have deeded to such receiver the titles held by him and by said James and Jared Clarke; that if said Roby is not by his said acts and conduct, barred in equity from claiming any interest in said land as against your orator and said William H. Colehour, as your orator claims, he is entitled to only one quarter of the net profits of said land, after all the debts and liens against it are paid, and that unless said title is controlled by the court as aforesaid, by the appointment of a receiver with power to sell the same,
36 neither your orator, said William H. Colehour or said Roby will, as your orator verily believes, ever obtain a cent from said property. Whereas, if the title to the same is made perfect, by deeds to a receiver, and he ordered and directed to sell the same, at least $200,000

net can be obtained by sale of said property over and above the amount required to pay said Clarke debt. And your orator says he is informed and believes and charges the fact to be that said Roby intends at once to convey his said titles in said land to some person or persons to your orator unknown in order to deprive your orator and said Wm. H. of their interest in said lands.

Twenty-seventh. That neither said Roby, your orator, or said William H. Colehour, have the means to pay the said Clarke debt and redeem said property, and that no purchaser could be found who would take the title as it now stands and pay therefor anything like an adequate consideration. But that if said Roby, your orator, and said William H. Colehour, deed to a receiver said titles which they control, a perfect title to said lands can be made by him. That your orator has demanded of said Roby that he convey his said title to said land to your orator, to be held as trustee for the benefit of those beneficially interested in said land, and that he, said Roby, has absolutely refused so to do, and claims that he is the sole owner of the same.

39 *Twenty-eighth.* That the lands sold under said Clarke foreclosure proceedings, and which are all of the said first described lands in which your orator, said William H. Colehour, or said Roby have any interest, are described in "Exhibit A," hereto attached and made a part hereof, and which shows the amount at which each lot and parcel was sold for at said foreclosure sale, and what will have to be paid to redeem the same.

Twenty-ninth. Your orator has offered to the said Roby to account with him, and allow to him everything he was entitled to, and he hereby offers to pay, do or perform, whatever shall by this court be deemed necessary and equitable in order to entitle him to the relief demanded.

Jurisdiction clause.

PRAYER.

First. For summons to *answer without oath.*

38 *Second.* That the said deed from William H. Colehour to said Roby, recorded in book 1971 of records, page 529, be held and declared null and void and of no

effect and set aside as a cloud upon the title of your orator and said William H. Colehour.

Third. For injunction.

Fourth. That a receiver be appointed by this court, and that the said Roby, William H. Colehour and your orator, be ordered and directed to convey and cause to be conveyed to such receiver the said titles to the said land or any part thereof held or controlled by them or either of them, and that said receiver be under the direction of this court ordered to sell the same, and if necessary pay Thunman said fifteen hundred dollars judgment, and hold the proceeds subject to the final decree in this cause.

Fifth. That your orator and said William H. Colehour be decreed to be the owners of the equity of redemption in said lands.

Sixth. That your orator may have such other and further relief as shall seem meet to your Honor, and shall be agreeable to equity and good conscience.

CHAS. W. COLEHOUR.

MONROE & McSHANE,
Complts. Solcr.

H. S. MONROE,
of Counsel.

39 EXHIBIT A.

The N. ½ of S. E. frl. ¼ Sec. 17, T. 37, R. 15, E. 3d P. M. was sold to Charles E. Speer for	$	9,000 00
The N. E. frl. ¼ Sec. 17, T. 37, R. 15, was sold to Charles E. Speer for	$	30,000 00
Lots and Blocks in Ironworkers' Addition to South Chicago, a Subdivision of S. ½ Sec. 8, T. 37, R. 15.		
Block 46 was sold to Robert E. Jenkins for	$	100 00
Lot 1 in Block 45 was sold to Charles E. Speer for	$	25 00
Lot 2 in Block 45 was sold to Charles E. Speer for		30 00

The list continues in the same form to page 86 of the record, the amount of sales being footed up, and at page 86 showing an aggregate of..... $129,252 00

Then the list continues to page 92, where the record gives the footing thus:

92 Total January 29, 1890. Sale amounts to 40,450 73

The aggregate footing is..... $169,702 73

February 8, 1890, there was filed in said cause a certain answer, to wit:

93 to 140 The answer of Edward Roby to said bill.

This answer followed the bill paragraph by paragraph, answering categorically each paragraph.

209 Before the hearing was closed plaintiff (Charles W. Colehour) amended his bill and took a rule on defendants to answer his amended bill; and within the time limited defendant Roby filed his answer to the amended bill;

275 and by agreement it was ordered that such answer stand as the answer to the cross-bill of William H. Colehour (filed on the last day of the hearing), and that general replication should be considered as filed thereto.

In delivering his opinion the court gave leave to the Colehours to amend their respective bills; and afterwards the bill of Charles W. Colehour was amended; and it was ordered that the answer on file stand as the answer to such amended bill, the replication to stand to such answer.

The answer of Roby to the amended bill added matters which he had sought to introduce by amendment, and answered the new matters introduced by plaintiff's amendments to his bill; and the submission of this case No. 78,915 and decree was made on the Amended Bill of Charles W. Colehour, the Cross-Bill of William H. Colehour, the answer of Roby to said amended bill, which stood also as an answer to the Cross-bill of William H., and general replication to such answer. Hence the first answer filed Feb. 8, 1890, shown at pages 93 to 140 of the transcript does not require to be further stated in this abstract.

141 Replication to said answer of said Roby filed February 15, 1890.

142 Summons issued Jan'y 30, 1890.
143 Served on Roby Feb. 15, 1890.

ANSWER OF WM. H. COLEHOUR.
Filed February 24, 1890.

144 The separate answer of William H. Colehour to the bill of complaint of Charles W. Colehour against this defendant and Edward Roby

Admits that the allegations and averments in said bill are true as set forth respectively in sections or numbers 1, 2, 3, 4, 5, 6, 7, 8, 9, 10 and 11;

And that the averments in number 12 are substantially true. That said Charles W. Colehour had the general charge and substantial possession of said land as stated therein; except that, while said Charles W. Colehour was in Europe, during the years from 1880 to 1883, this defendant held, as he supposed, the possession of the same. But before this defendant had, at the request of said Roby, deeded said land to Charles W. Colehour; and, during
145 said last mentioned years the defendant held possession of said land for said Charles W. Colehour, trustee.

That the averments in numbers 13, 14, 15, 16, 17, 18 and 19 are true.

That the averments in number 21 he believes to be true. That said Roby asked this defendant to deed the said land to Charles W. Colehour; but whether he assigned the reason therefor stated in said number 21 this defendant does not know.

That the allegations in the second paragraph of said number 21 of said bill are true. And in addition thereto, this defendant says, that said Roby, in addition to what is there stated, agreed, in consideration of this defendant giving said deed to said Roby, to deed, not only the lots on which this defendant's home stood to the defendant's wife, but also to deed her 12 lots in Block 37; 4 lots in Block 30; and 1 lot in Block 7, being part of said land. And that this defendant afterwards found that said Roby did not own said lots, and could give no title thereto.

That each and every allegation contained in the following paragraphs or numbers of said bill are, as this defendant verily believes, true.

And this defendant says, that he believes it to be for
146 the best interests of all the parties to this suit, that a receiver be appointed, as in said bill is prayed; and that he be empowered to sell said lands, under the direction of this court, and pay the master the sums necessary to redeem the lands sold, and that by so doing a large amount of money can be realized, over and above the amounts required to redeem said lots from said mortgage sale, and pay all claims against them, *and this defendant unites in the prayer of said bill.*

WILLIAM H. COLEHOUR.

W. C. GOUDY, Solicitor.

ORDER, REFERRING CASE TO MASTER TO TAKE PROOFS, entered February 24, 1890.

147 By agreement of parties, this cause is referred to Master George Bass, who shall take all evidence to be used in the cause, and report the same to the Court.

Plaintiff to have 10 days to close proofs, defendant 10 days, and plaintiff 5 days for rebuttal: *provided* that complainant may be permitted to offer the evidence of witnesses Charles G. Harris and Joseph Kilby at any time before the time fixed for defendant to close proofs.

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147 BILL.

Filed January 7th, 1890.

EDWARD ROBY v. CHARLES W. COLEHOUR AND JAMES E. CLARKE.

148 To the Honorable, the Judges of the Circuit Court of Cook County in Chancery Sitting:

Humbly complaining shows unto your Honors your Orator, Edward Roby, that January 14, 1878, Jacob Bremer to secure the payment of notes of $45,750 and in-

terest, conveyed to Charles W. Colehour, Trustee, Lots 1 to 18 in Block 1, Lots 8 to 30 Block 20, the West half of Block 32, all Blocks 31, 42, 43, 44, 45, Iron Worker's Addition to South Chicago, a Subdivision of S. ½ Sec. 8,
149 T. 37, R. 15, with power to sell for default, etc.; that having given notice, etc., he did sell Sept. 22, 1886; that Roby bid $50,000 at the sale, and satisfied Bremer's notes to that extent, and Colehour as trustee conveyed the land to James E. Clarke, without any consideration moving to him from said James E. Clarke whatsoever; that orator (Roby) is owner of all said notes and indebtness of Bremer, and of all said premises so conveyed to said Clarke; and that said Clarke now holds the same only in trust for orator.

Oath to answer was waived.

150 Prayer was, that Clarke might be required to convey the premises to orator, or for such other or further or different relief in the premises as equity may require.

151 And thereupon said cause received the General Number 78,382 and Term Number 4,642.

January 7th there issued out of said court a summons in said cause.

152 Summons and return personally served on Charles W. Colehour, January 10, 1890.

153 Appearance entered in said cause January 16, 1890, entitled &c.

I hereby enter the appearance of James E. Clarke and Charles W. Colehour in the above cause.

C. W. COLEHOUR, Solicitor.

By reason of the appearance the affidavits of non-residence and certificate of publication and mailing, appearing upon the following pages, are immaterial.

157 ANSWER OF JAMES E. CLARKE to said Bill of Complaint of Edward Roby. *Filed Feb. 5, 1890.*

This defendant says that he claims no interest in said land as described in said Bill; that he has already deeded it to Charles W. Colehour as trustee etc., and this de-

fendant denies all and all manner of unlawful combina-
158 tion and confederacy, etc., in the formal method of conclusion.

JAMES E. CLARKE.

MONROE & MCSHANE,
Defts. Slrs.

159 ANSWER OF CHARLES W. COLEHOUR to the Bill of Complaint of Edward Roby. *Filed Feb. 5, 1890.*

This defendant admits that on the 14th day of January, 1878, Jacob Bremer, to secure the payment of his promissory notes for the sum of $45,750, conveyed to this defendant, as trustee, the Lots and Blocks mentioned in said Bill of Complaint; and that in said Trust Deed power was granted this defendant in case of default in the payment of said notes, or either of them, upon certain notice in said Deed prescribed, to sell the said lands, and all the rights and equity of redemption of the said Bremer therein, for the satisfaction of the indebtedness evidenced by said notes. This defendant admits that due notice was given pursuant to the power in said trust deed contained, said notes not having been paid; and that this defendant,
160 as trustee in said trust deed, did, pursuant to said notice, on the 22d day of September, 1886, offer for sale and sold the said lots described in said bill. But this defendant denies that they or any part of them were sold to the complainant, Roby. But this defendant says, on the contrary, they were at the sale struck off, sold and conveyed to the said James E. Clarke, for the consideration of $50,000, the amount of said debt. And this defendant admits that the said notes of the said Bremer, and the indebtedness thereby secured, were to that extent satisfied and canceled. But this defendant denies that the said Roby ever at any time became entitled to a deed of said premises, or any part thereof, from this defendant. This defendant admits and states the fact to be, that thereafter he conveyed the said premises to the said Clarke, and says that the same was done by agreement with said W. H. Colehour and said Roby, the consideration being $50,000, as mentioned in said deed; and he admits that no money was paid by

said James E. Clarke to this defendant, or to any other person; and he says that the said James E. Clarke holds the title to the said land in trust for the benefit of the persons legally and equitably entitled to the same.

This defendant denies that said complainant (Roby) ever was, or is now the owner of all or any of the said
161 notes or of the said indebtedness of said Bremer; and says that said indebtedness secured by said Bremer's deed to this defendant at the time of said deed to Clarke belonged to the equitable owners of said land, subject to a trust deed to V. C. Turner for $86,000 and interest on the same; and says that said equitable owners were this defendant and William H. Colehour; and that said Roby would, if he fulfilled his agreement as hereinafter stated, have become entitled to one-quarter.

This defendant denies that said Roby is the owner legally or equitably of said estate conveyed to said Clarke, and denies that said Clarke holds the same or any part thereof in trust for said Roby; and denies that said Roby is entitled to a deed of the same or any part thereof.

Further answering this defendant said that said Roby's rights in said land, or to one-fourth of the profits to be derived from the sale of the same, was and is derived from a *Declaration of Trust made on the 16th day of August, 1873*, by William H. Colehour; who then held the legal title to the land mentioned therein; which included the land conveyed by said Bremer to this defendant, which was in the words and figures following, to wit:

Here follows the Declaration of Trust signed William H. Colehour, and bearing date August 16, A. D., 1873, which was set forth in the bill of said Colehour and is above printed at large on page 11.

163 The certificate of acknowledgment and the certificate
164 of recording the same, also copied in said bill, are copied in full in this answer.

This defendant further says that the sole and only consideration for the agreement to give said Roby one-fourth of the said net profits was his agreement to, in good faith, attend to and defend all suits brought against said land, and the parties interested in the same, and do all the legal business connected therewith, until the indebtedness against said land should be paid, and the same sold.

And this defendant says that said Roby has not performed his said agreement, has not attempted and is not attempting in good faith to perform it. But has by circumvention and fraud attempted to defeat and destroy the rights of this defendant and said William H. Colehour, and to get into his own hands or under his control the equity of redemption in the land covered by said declaration of trust; and has thereby, in law and equity, forfeited all his rights in said land.

And this defendant denies all and all manner of unlawful combination and confederacy wherewith &c., concluding with the formal conclusion.

165 CHARLES W. COLEHOUR.

MONROE & MCSHANE,
Defts. Slrs.

H. S. MONROE,
of Counsel.

February 8th, 1890, REPLICATION was filed to said answers.

166 Replication of Edward Roby to the several answers of Charles W. Colehour and James E. Clarke, last aforesaid.

167 Certificate of publication of notice to James E. Clarke.

168 Notice so published.

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169 BILL.

Filed January 7th, 1890.

EDWARD ROBY v. CHARLES W. COLEHOUR AND JARED MYERS CLARKE.

170 To the judges of the Circuit court of Cook county.

Edward Roby complains and alleges that, July 2d, 1877, William H. Colehour was seized in fee of land in said Section 8:

Beginning at the intersection of the North line of S. ½ of Sec. 8, with center line of Michigan Southern and

Northern Indiana R. R, as originally located; thence North 30° 30′ E. 20 chains 25 links to Lake Michigan; thence S. 25° 30′ E. along Lake Michigan to State Line; thence S. along the State Line to N. side of said R. R. right of way; thence N. W. along said right of way to the intersection with first line.

That William H. Colehour, being so seized of said premises, continued to hold the same down to the time of the conveyance to your orator (Roby) hereinafter mentioned.

171 Nevertheless there was recorded in the office of the recorder of deeds of said county, on September 25, 1877, an instrument purporting to be a warranty deed from said William H. Colehour to Jared Myers Clarke, of Pennsylvania.

Plaintiff is informed, and believes, that said deed was never made, executed or delivered by the said William H. Colehour, and that the same was not his deed; and plaintiff charges that said instrument was not made or executed or delivered by the said William H. Colehour.

Orator further says that said Jared Myers Clarke paid nothing for said land, and that the apparent and pretended title claimed under the same instrument and record thereof was and is vested only in trust, if any title whatsoever ever passed to said Jared Myers Clarke.

And that afterwards and on January 6th, A. D. 1887, said William H. Colehour for a valuable consideration, by certain deeds released and conveyed to your orator (Roby) all the said premises and all interest therein, both legal and equitable, and all rights against the said Jared Myers Clarke, and your orator became and was entitled to all the said premises in fee, free and clear from all claim of the said Clarke.

Orator is informed and believes that Charles W. Cole-
172 hour claims to have some right or interest in said premises under and through the said Jared Myers Clarke:— But orator charges that neither he, said Charles W. Colehour, nor said Jared Myers Clarke has any interest whatsoever in the said premises or any part thereof.

Your orator is in possession of said premises.

Oath to answer was waived.

Prayer was, that said Deed to Clarke may be declared

null and void; and that the title to the premises may be declared to be vested in orator, free and clear of all claims of the said Clarke; and that he may be required to convey all right, title and interest appearing in him, said Clarke, unto your orator; and that your orator's title may be quieted and set at rest; and that your orator may have such other or different relief as equity may require.

173 And said cause received the General Number 78,383, Term Number 4643 Chancery.

Affidavit of non-residence.

Affidavit states that Jared Myers Clarke, defendant, resides out of this state, and on due inquiry cannot be found, so that process cannot be served upon him; and affiant further states that upon diligent inquiry the place of residence of the said defendant, Jared Myers Clarke, cannot be ascertained.

Signed and sworn to by Edward Roby, January 7th, 1890, before the Clerk of Cook Circuit Court, and filed in said Court.

174 Summons. To Jared Myers Clarke and Charles W. Colehour in said cause.

175 Return; served on Charles W. Colehour, January 10th, 1890, the other defendant not found in my county.

CANUTE R. MATSON,
Sheriff.

ANSWER OF CHARLES W. COLEHOUR.
Filed February 5, 1890.

177 The answer of Charles W. Colehour to said Bill of Complaint admits that William H. Colehour was seized of the legal title to the land described in said Bill on July 2d, 1877; but denies that he continued to hold the same down to the date of an alleged conveyance to said Roby, to wit: January 6th, 1887. Admits that on or about September 25, 1877, there was recorded in the Recorder's Office of Cook County in Book 724, at page 188, an instrument purporting to convey said land to one Jared Myers Clarke,

of Pennsylvania, and that the same was a full warranty deed. This defendant denies that said deed was not made, executed and delivered to said Clarke by William H. Colehour. And says that the same was the deed of said William H. Colehour, and was duly delivered to said Clarke, and by the knowledge and consent of said Roby.

This defendant, further answering, says that said Clarke made and executed his certain promissory notes, and secured the same by a trust deed upon the land described in said Bill of Complaint; and said notes were delivered to said William H. Colehour as trustee of the land described in said Bill under a *Declaration of Trust of date August 16th, 1873*, which instrument is appended to this answer
178 by copy and made part thereof and marked "Exhibit A."

This defendant admits that said Clarke paid nothing for said land; and says that said land in said Bill described was deeded to said Clarke for the purpose of raising money on said Clarke's notes with which to remove and pay off a part of the original indebtedness on said land; and that said Clarke gave his notes secured on said lands by way of purchase money due for the same. That said notes were not paid, and that said land has already been reconveyed to the present trustee of Iron Worker's Addition and other lands, the defendant in this suit (Charles W. Colehour).

Further answering, this defendant says that he has no knowledge of William H. Colehour, on January 6th, 1887, conveying all interest in said land to said Roby, by deed, but that if such deed was delivered as alleged by said Roby in his Bill, such deed was without consideration, fraudulent and void, both as to this defendant and William H. Colehour; and said Roby should be estopped from taking any interest thereunder.

This defendant denies that said Roby is in possession of said land now, or that he has ever been so in possession, and says that this defendant is now in possession of said land, and has been since the 25th day of September, 1877.
179 This defendant further shows that on the 1st day of May, 1879, William H. Colehour, by his deed, conveyed to this defendant the whole of the land described in said Bill of Complaint, and other lands, as well as all lands he then held as trustee, and that this defendant was then in

the undisturbed possession of said land, as well as all lands conveyed by said deed, and that he has been in possession of the same from the date of said deed to the present time; a copy of which deed is hereto appended and made part thereof, and marked "Exhibit B."

Defendant further says that he holds said land under said deed as Trustee, *according to the terms of the said Declaration of Trust, dated August 16th, 1873*, a copy of which is hereto appended and marked "Exhibit A," and hereby made a part of this Answer.

And defendant says that said Roby and William H. Colehour knew of said deed being delivered to this defendant and advised the same be done when and at the date when it was so delivered; and they both knew that this defendant thereby took the position of Trustee of said land instead of and from the said William H. Colehour; to hold the said land, according to the terms of said Declaration of Trust herein referred to as "Exhibit A"; he further says that a copy of said deed from William H. Colehour to this defendant dated May 1st, 1879, is hereto appended and made part of this Bill, and marked "Exhibit B." Then follows the usual formal conclusion
180 denying combination and confederacy.

(Signed) CHARLES W. COLEHOUR.

EXHIBIT A.

This is the same Declaration of Trust, so-called, bearing date August 16, 1873, with the certificate of acknowledgment and recording following, which Declaration of Trust is printed in full at page 11, *ante*.

This is the instrument which states that Roby has a
181 right in the land or to the proceeds, growing out of his services as a lawyer, to be rendered as they may be required by William H. Colehour. And that if either beneficiary should seek to acquire any interest in the land before it is paid for he should forfeit the interest he is entitled to; and that the power of attorney heretofore given to Charles W. Colehour in which he is to have $5,000 a year out of the land, is to remain in force.

182 Certificate of acknowledgment before Charles G. Harris, August 13, 1875.

183 Certificate of recording, July 14, 1888, at 11 o'clock.

EXHIBIT B.

Deed from William H. Colehour to Charles W. Colehour.
Dated May 1, 1879.
Consideration $1.
184 Conveying specific lots and blocks named.
185 Made and delivered subject to Declaration of Trust, dated August 16, 1873, in the hands of Charles W. Colehour.
Certificate of acknowledgment before Charles G. Harris, May 1, 1879.
186 Certificate of recording, July 14, 1888, at 11 o'clock.

DEED.
WM. H. COLEHOUR TO CHAS. W. COLEHOUR.
Dated May 1, 1879.

Know all men by these presents that I, WILLIAM H. COLEHOUR (a bachelor) do, *in consideration of one dollar* to me in hand paid by CHARLES W. COLEHOUR of the second part, grant, bargain and sell to Charles W. Colehour the following described land, to wit:

The North half of the South East quarter and the North East quarter of Section 17, T. 37, N., R. 15, E. 3d P. M.

And the following lots and blocks in Ironworkers Addition to South Chicago being a subn. of the South half of fractional Sec. 8, T. 37, N., R. 15, E. 3d P. M., Cook County, Illinois.

Lots 1 to 18, Block 1; Lots 1 to 23, Bk. 2; Lots 4 & 5, Bk. 3; Lots 1, 2, 10, 11, 12, Bk. 4; Lots 1 to 11, Bk. 5; Lot 1, Bk. 7; Lot 1, Bk. 8; Bk. 9; Lots 5 to 14 and 28
184 to 46, Bk. 10; Lots 40, 41 and 44 to 48, Bk. 11; Lots 47 & 48, Bk. 12; Lots 6 to 48, Bk. 15; Lots 7 to 22 and 25 to 48, Bk. 16; Lots 6 to 41, Bk. 17; Lots 4 to 33, Bk. 18; Lots 1 to 32, Bk. 19; Lots 8 to 30, Bk. 20; Lots 1 to 55, Bk. 22; Lots 1 to 43, Bk. 23; Bk. 24, entire; Lots 1 to 21 and 25 to 48, Bk. 25; Lots 1 to 48, Bk. 26; Lots 1 to 24 and 29 to 39, Bk. 27; Lots 5, 6, 7, Bk. 28; Lots 5, 6, 7, 8, 21, 22, Bk. 29; Lots 8, 9, 10, 11, 18, 19, 20, 25, 26 and 27 to 33 and 45 to 48, Bk. 30; Bk. 31, entire; Lots 10 and 11 and 25 to 48, Bk. 32; Lots 8, 15, 16, 17 and

18 to 29 and 40, 41 and 47, Bk. 33; Lots 2 to 7 and 18 to 32, 39, 42, 43 & 44, Bk. 34; Lots 6, 13, 20, 21, 22, 23, 24 and 25 to 30 and 42, 43 & 44, Bk. 35; Lots 1 to 46, Bk. 36; Block 37, entire; Lots 5 to 48, Bk. 38; Bk. 39 entire; Bk. 40 entire; Bk. 41 entire; Bk. 42 entire; Bk. 43 entire; Bk. 44 entire; Bk. 45 entire, and Bk. 46 entire.

Also the following piece of land situate in the county of Cook and State of Illinois: Commencing at the point of intersection of the Lake Shore and Michigan right of way, as located July 18th, 1871, that is the center line of said right of way, with the east and west line of the center of Sec. 8, T. 37 N., R. 15 E. 3d P. M., and running thence on a course North 30° and 30′ East 20 chains and 25 links, more or less, to Lake Michigan; thence along the shore of Lake Michigan, on a course South 25° and 30′, more or less, East to the intersection of the State line; thence South along the State line to a point 50 feet North
185 of the center of said right of way; thence on a course north-westerly along said right of way to the point of beginning; all in fractional section 8, T. 37 N., R. 15 E. 3d P. M., Cook County, Illinois.

This deed is made and delivered subject to a declaration of trust made by me August 16th, 1873. And the above described land is conveyed subject to the terms of said trust, the original of which declaration of trust is in the possession of Charles W. Colehour, grantee hereof.

I also grant, bargain and sell to Charles W. Colehour the West ½ of North West quarter of Sec. 17, T. 37 N., R. 15 E. 3d P. M., Cook county, Illinois, subject to my declaration of trust of date Feb. 22d, A. D. 1876, held by Charles W. Colehour.

In witness whereof, I have hereunto set my hand and seal this 1st day of May, A. D. 1879.

WILLIAM H. COLEHOUR. [SEAL.]

Certificate of acknowledgment by *Charles G. Harris,*
186 as notary public, bears date May 1, 1879.

Certificate of recording shows it recorded as Doc. 981,155, July 14, 1888, at 11 A. M.

187 *Replication* by Edward Roby to separate answer of Charles W. Colehour. Filed February 8, 1890.

188 Certificate of Publication of Notice to Jared Myers Clarke in Chicago Negal News, a weekly newspaper published every Saturday in the City of Chicago, of general circulation, etc., showing that the notice was first published January 11th, 1890, and last published February 1st, 1890; that it was published four times.

Certified by the President of the Legal News Company.

189 Notice in the usual form as notice to non-resident defendant, giving the title of the case, etc., as required by Statute.

190 ORDER, March 24, 1890, entering default of Jared Myers Clarke.

On filing due proof of notice to the said defendant Jared
191 Myers Clarke of the pendency of this suit, by publication according to the statute in such case made and provided, on motion of complainant's solicitor it is ordered that the said defendant Jared Myers Clarke plead, answer or demur to the Bill of Complaint in this cause instanter; and the said defendant though solemnly called in open Court comes not, but makes default; whereupon on motion, it is ordered that the Complainant's Bill of Complaint be, and hereby is taken as confessed by said defendant Jared Myers Clarke.

BILL.

192 Filed January 7, 1890.

EDWARD ROBY V. CHARLES W. COLEHOUR.

193 This Bill alleged that on June 15, 1875, Charles G. Harris, to secure the payment of his notes for $6,750, and interest, conveyed to Charles W. Colehour, as Trustee, Lots 1 to 15 and 34 to 48, of Block 26, of said Iron Worker's Addition, with power to sell for default, etc., and as by the Trust Deed, recorded in Book 437, p. 313, will more fully and at large appear.

194 That said indebtedness of said Harris afterwards became and was the property of your orator.

That afterwards said Harris made, executed and de-

livered unto said Charles W. Colehour, Trustee as aforesaid, his certain Deed, wherein he released unto the said Colehour all his right and equity of redemption in the said lands and premises; and thereupon the said lands and premises became vested in the said Colehour, only in trust for your orator.

Oath to answer was waived.

Prayer was, that he, Colehour, may be required to convey the said premises unto your orator, your orator hereby offering to pay to him all reasonable trustee's fees and expenses for so doing; and that your orator may have such further or other or different relief in the premises considered as may be meet.

And thereupon said Bill received a General Number, 78,384 of said Court, and Term Number 4,644.

196 Summons, and Return: personally served on Charles W. Colehour, January 10, 1890.

Appearance of Charles W. Colehour, defendant, filed January 16, 1890.

198 ANSWER OF CHARLES W. COLEHOUR.

Filed February 5, 1890.

This defendant admits that Charles G. Harris on June 15th, 1875, gave his notes of that date for $6,750, and secured them by Trust Deed on the Lots named in the Bill, as alleged in the Bill, and said notes were made payable to William H. Colehour, who was the trustee of all the lands in Iron Worker's Addition in which the above described lots were situated; and included a part thereof. And said notes were the property of said William H. Colehour, as well as the indebtedness thereby secured.

199 This defendant denies that said notes ever have been or are now the property of Edward Roby, complainant. This defendant, further answering, says that (by deed) May 1st, 1879, William H. Colehour, as trustee of all the land in Ironworkers' Addition, as well as other lands held by him under a certain *Declaration of Trust, bearing date August 16th, 1873*, a copy of which deed is hereto appended and made a part of this answer, and marked

"*Exhibit A*," deeded all of said lands then remaining unsold to this defendant, *subject to the terms of said Declaration of Trust*, and this defendant says that said notes of Harris, and the indebtedness thereby secured, then became the property of this defendant, and is now his property as such trustee; and this defendant took from said Harris a deed conveying to him, this defendant, all the lots above described; and he now holds said lots as Trustee of Ironworkers' Addition under the terms of said Declaration of Trust. And this defendant says that William H. Colehour, Edward Roby, the complainant, and this defendant, at the time said Harris conveyed said property to this defendant, understood and agreed that this defendant should take said property from said Harris; and he holds the same under the terms of said Declaration of Trust, a copy of which is hereto appended, and marked "Exhibit B."

200 This defendant denies that said lands, by said deed from Harris to this defendant, became vested in this defendant in trust for said Roby; but says that they became vested in him as Trustee, and under and by virtue of a *Declaration of Trust, dated August 16, 1873, a copy of which is hereto annexed and marked "Exhibit B*," and which is made part hereof. And that under said deed from said Harris this defendant took and has held possession of the said land ever since its date.

And this defendant denies all and all manner of unlawful combination, etc., the usual formal conclusion of an answer.

CHARLES W. COLEHOUR.

No solicitors named.

201 EXHIBIT A.

Deed.

William H. Colehour to Charles W. Colehour.

Dated May 1, 1879.

Acknowledged May 1, 1879, before Charles G. Harris, Notary Public.

Recorded July 14, 1888.

Conveys, among others, the lands described in the bill.

202 "This deed is made and delivered subject to a declaration of trust made by me August 16th, 1873, and the

above described land is conveyed subject to the terms of said trust, the original of which declaration of trust is in the possession of Charles W. Colehour, grantee hereof."

204 EXHIBIT B.

This is the same instrument of Aug. 16, 1873, set out in said Colehour's bill and printed in full *ante*, p. 11, viz:

Declaration of Trust, William H. Colehour to Charles W. Colehour.

Dated August 16, 1873.

States that Edward Roby shall be entitled to one quarter of the profits of the land when the debts are paid, but should Charles Colehour or Edward Roby, either of them seek to acquire any interest in the land before fully paid for, he shall forfeit the interest he would be entitled to by the terms of this Declaration.

The Power of Attorney heretofore given to Charles
205 W. Colehour, promising to pay him $5,000 a year out of the proceeds of the land shall remain in full force.

The sole consideration for the interest of said Roby as above named grows out of his services as a lawyer to be rendered me as I require the same until this land is fully cleared of all debts of every nature.

The terms of this Trust cannot be changed.

After the signature it says, I have this day, August 16th, 1873, given to Hansbrough for his interest in said land my note for $15,066.47 and taken up my contract with him.

Acknowledged before Charles G. Harris, Notary Public, August 13, 1875.

206 Certificate of recording July 14, 1888.

207 Replication. Filed February 8th, 1890.

It will be observed that the four cases were at issue by Answers and Replications, except that Jared Myers Clarke had put in no answer, but his default had been

entered in March. The Cross-Bill of William H. Colehour had not been filed at that time. On the 25th of April, 1890, the following order was entered in the case entitled, Charles W. Colehour v. Edward Roby et al., which is the long Bill, first above printed.

ORDER CONSOLIDATING CASES.

208 By agreement of parties it is ordered that the cases numbered 78,382, Term Number 4,642, 78,383, Term No. 4,663 and 78,384, Term Number 4,644, be and they are hereby consolidated with this case.

ORDER GIVING LEAVE TO AMEND BILL, ETC.

209 May 14, 1890. At the April Term of said Court, the following proceedings were had and entered of record, entitled Charles W. Colehour v. Edward Roby et al., Bill and Consolidated cases.

On motion leave is hereby granted the Complainant to amend his Bill of Complaint herein instanter, and the defendants are hereby ruled to answer the same by ten o'clock to-morrow morning.

On motion of W. C. Goudy, Esq., leave is granted William H. Colehour to file his Cross-Bill herein.

AMENDMENTS TO BILL of Charles W. Colehour.

And instanter on May 14, 1890, the plaintiff filed in said Court his Amendments to his bill in the words and figures following, to wit:

ALLEGING DEED.

WILLIAM H. COLEHOUR TO RICHARD D. LENDER.

25½ Complainant further shows unto your Honor, that during the years between 1874 and 1877, inclusive, William H. Colehour, with the knowledge and consent of the said Roby, and at his request, conveyed to Richard D. Lender for the sole purpose of obtaining the notes of the said

210 Lender secured on the lots sold, said Lender paying nothing whatever on said lots, the following described land situated in Cook County, Illinois, to wit:

Lot 5.....In Block 3
Lots 11, 12, and 28 to 42, inclusive.....In Block 10
Lot 4.....In Block 16
Lot 6.....In Block 17
Lots 1 to 20, inclusive,.....In Block 23
Lot 29 to 37, inclusive.....In Block 27
Lots 27 to 32, inclusive.....In Block 30
Lots 10 and 11.....In Block 32
And Lots 2 to 6, inclusive.....In Block 34

In Iron Workers' Addition to South Chicago.

Also part of block 9, viz: 35 feet front on Avenue L, fronting east, 125 feet deep, and lying south of and adjoining the land deeded to Egbert Gulick, which embraced the north 495 feet of said block 9.

211 Said Lender agreeing to hold the title under the same trust said William H. Colehour held by.

And to redeem the same when the notes he gave were paid or surrendered to him.

DEED, LENDER TO ROBY, AND ATTACK THEREON.

That on or about the 23d day of November, 1886, said Roby falsely and fraudulently represented to said Lender that he, said Roby, owned the entire equity in the said trust estate, and was entitled to a deed of the land conveyed to him, said Lender, and asked said Lender to convey the same to him. That said Lender, believing said Roby told him the truth, on said 26th day of November, 1886, by deed duly executed, acknowledged and delivered to said Roby a quit-claim deed of the same; which said deed was procured by said Roby in fraud of the rights of your orator in the premises, and ought to be held void and of no effect as to your orator, and to be conveyed to a receiver to be appointed by this court.

Filed May 14, 1890. Henry Best, Clerk.

212 CROSS-BILL OF WILLIAM H. COLEHOUR.
Filed May 14, 1890.

Your orator, William H. Colehour, by way of cross-bill to the complaint of Charles W. Colehour against Edward Roby and William H. Colehour, says:

Then this cross-bill goes on to state its version of the several pleadings filed in that case up to that time, and then on file, all of which appear in the transcript of the
217 record. This preliminary statement closes with these words: "And your orator refers to said bill and answers for a full statement thereof."

In reciting the original bill, this cross-bill had referred to the purchase of above described land from the Clarkes, and the giving by William H. Colehour of his notes for $86,000, secured by trust deed to Volùntine C. Turner, and his assumption of the note of $4,000, running to Mary P. M. Palmer, secured by trust deed to Chauncey Bowen. The cross-bill proceeds at page 217.

Your orator further says, that during the year 1871 the real estate hereinbefore described was purchased from the said Henry F. Clarke and others, and the title conveyed to your orator by deed of July, 1871. But said land was purchased by William Hansbrough, Charles W. Colehour, Wesley Morrill and Francis Corby, for the purpose of selling the same and realizing the profits therefrom. And it was understood and agreed between them that your orator should hold the title, and make conveyances as the same might be sold, and the net profits should be divided to William Hansbrough one-half, Wesley Morrill one-sixth, Charles W. Colehour one-sixth, and Francis M. Corby one-sixth.

218 And your orator further says, that he continued to hold the legal title to said premises; but, in the year 1873, the interest in the profits thereof was changed, so that the said Charles W. Colehour was entitled to one-half, Edward Roby one-fourth, and your orator one-fourth; and for the purpose of evidencing said facts your orator executed an instrument in writing which reads as follows:

Here follows the declaration of trust, bearing date August 16th, 1873, and signed William H. Colehour, which is set out in the original bill of Charles W. Cole-

hour and is above printed in full at page 11. The bill also shows the memorandum at the foot of the instrument after the signature of William H. Colehour, which is also printed in full above.

220 And your orator further says that said declaration of trust was accepted by the said Charles W. Colehour and Edward Roby, and has been acted upon since.

Your orator further says that the said Edward Roby now alleges that the said instrument in writing is not the one under which the parties have so acted, but claims that one was executed at a later day than the foregoing by your orator, which reads as follows:

Here follows a copy of the declaration of trust claimed by the defendant, and which is shown in his answer, filed Feb. 8, 1890, Rec. p. 109; and in his answer to amended bill; where the same is printed in full *post*, Marg. p. 246.

(This instrument is one which was written in the handwriting of Charles W. Colehour and signed by William H. Colehour, and produced by the defendant Roby. It appears in his answer in its chronological order.)

222 Your orator further says that in December, 1873, the south half of said section 8 was subdivided into blocks and lots, about 2,000 in number; that streets were graded and other improvements made; and subsequently a portion of said lots were sold to other persons; and that by an arrangement with the said Clarkes some of the lots which were sold were released from the mortgage held by them; and, with the exception of the premises so sold, the equitable interest of the said Charles W. Colehour, Edward Roby and your orator have remained unchanged, as to the remainder of the property so remaining unsold.

And your orator further says that on or about the 1st day of May, 1879, your orator executed a deed to the said Charles W. Colehour conveying the legal title in the portion of the premises remaining unsold, subject however, to the trust which had been established according to the instrument of writing hereinbefore set forth.

And your orator further says that from the time of the arrangement in 1873, between Charles W. Colehour, Edward Roby and your orator, the said Edward Roby has sustained the relation of attorney to your orator and

223 Charles W. Colehour with reference to said property and that various suits have been commenced and prosecuted relating thereto; in all of which the said Roby has appeared as their representative so far as their interests were involved in said land.

Your orator further says that in the year 1878 a *Judgment* was recovered against him and the said Chas. W. Colehour in the Superior court of Cook county for $4,113.58 in favor of O. H. Horton, receiver of the German Savings Bank, and that the judgment was for money used to pay to the said Clarkes, in reduction of the amount due on their mortgage. That *Execution* issued on said judgment and levied on certain lots described in the original bill herein; and sold to Roland R. Landis to whom a deed was made by the Sheriff, dated November 1, 1883.

And that at the June term of the said court, 1878, a judgment was recovered against your orator by Charles B. McCoy, for the use of Frank W. Harding, for $3,700 and costs. That execution was issued thereon and levied upon certain premises described in the original Bill herein; and sold on the 23d of May, 1885, to George F. Harding for $500. And that a Sheriff's deed was subsequently issued to him.

That on the 24th day of September, 1879, a judgment was rendered by said court against your orator and Charles W. Colehour in favor of Crane Brothers Manu-
224 facturing Company for the sum of $3,591 and costs. And execution was issued thereon, and levied upon certain lots, part of the said premises described in the original bill, which were sold to said Roby on the 14th day of September, 1886; and to whom a Sheriff's Deed was subsequently made.

That the said Roby subsequently procured conveyances from the said Landis and Harding of the property so deeded to them; and that he now claims to be the sole owner of the premises; and to have acquired the equitable interest of your orator, and said Charles W. Colehour by virtue of said judgments and deeds thereunder; and also by means of other sales and other judgments which your orator is unable to specify.

Your orator further says that said Roby acquired the execution titles aforesaid, in pursuance of an understand-

ing and agreement had between himself, Charles W. Colehour and your orator, for their joint use and benefit, and not adversely to the said Charles W. Colehour. That independent of any such understanding or agreement, the said Edward Roby was disabled from acquiring an adverse title to your orator or to the said Charles W. Colehour, by reason of the joint arrangement made between them as hereinabove stated, in the year 1873, and also for the further reason that the relation of attorney and client existed between them.

Your orator further says that on the 24th day of October, 1881, a bill was filed in the Circuit Court of
225 Cook County by Robert D. Clarke, Sarah J. Clarke and Harriet S. Clarke against your orator Charles W. Colehour and Edward Roby and others to foreclose said mortgage given to secure $86,000 of the purchase money hereinbefore mentioned. That such proceedings have been had that a Decree of foreclosure has been rendered by said Court, and subsequently affirmed by the Appellate Court, and the Supreme Court; under which all of the mortgaged premises, not sold in lots as hereinbefore mentioned, have been sold--some part of the premises on the 30th day of December, 1889, and the remainder on the 29th day of January, 1890, for the sum in the aggregate of $175,000, and the period of redemption from such sales is now running.

Your orator further says that said premises were sold in separate parcels; most of them for small amounts; and reference is made to the original bill herein and to the Exhibits thereto for a statement of such sales.

Orator further says that said premises so sold under the decree are worth from $200,000 to $250,000 more than the price for which they have been sold under the Decree. That the said Edward Roby, Charles W. Colehour and your orator are unable to redeem the same or to raise the money for that purpose, because of the con-
226 troversy in regard to the title thereto, between your orator and Charles W. Colehour on the one side and Edward Roby on the other; and the inability to make a satisfactory security or title to said premises. But if the said Edward Roby, Charles W. Colehour and your orator should unite in investing the title in a trustee, or a

receiver appointed by this Court, with authority to sell all equity of redemption, or said premises in lots or separate parcels, and make redemption from said sale, more than $200,000 could be realized, which should be divided between said Charles W. Colehour, Edward Roby and your orator, according to their respective interests.

Your orator further says, that there appears upon the record of deeds in Cook county, a deed purporting to be executed by your orator and his wife to Edward Roby, bearing date January 6th, 1887, and purporting to quit-claim and convey all right, title and interest of the grantors in Sections 8 and 17, in Township 37, North of Range 15, East of the 3rd Principal Meridian. And the said Roby now claims that by virtue of said deed, all of the interest of your orator in said premises was relinquished and conveyed to him. But your orator avers, that no such deed was ever executed by himself or his wife; and although their signatures appear to said deed, that such names were signed to a blank deed, long prior to that time, and for another purpose; and that the blanks in said deed have been filled up by some person without the
227 knowledge and consent of the grantors therein. And the said Roby also claims, that your orator executed another deed or assignment of his interest in the notes and other proceeds of the said land, and the legal title thereto, dated January 6th, 1887, which is not recorded.

Your orator further says that for some time prior to the middle of January, 1887, he was not upon social or business terms with his brother Charles W. Colehour, and had no communication with him in regard to this property, or other matters. That in the month of December, 1886, your orator was approached by Richard D. Lender; who came as a messenger of said Edward Roby; advising him to see the said Roby and make an arrangement with him in regard to said property. That after repeated solicitations to that end, your orator and his wife met the said Roby, at a hotel in the city of Chicago, on the west side; where the said Roby had procured a room for an interview, although the said Roby had an office in the south division of said city, where he was accustomed to transact his business. That in such interview the said Edward Roby represented to your orator and his

wife that he had acquired the title and ownership of all of the premises hereinabove described, subject only to the mortgage of the Clarkes; that he had procured title to certain judgments against Charles W. Colehour and your
228 orator; and had full power to take possession of such part of said premises as were then occupied by your orator and his family as a home. That unless a deed was made to him he would eject them from the premises. That at said time your orator and his family were in straightened circumstances; he, working as a laborer in a rolling mill at $1.60 per day, and he was without other means of support for his family. That he relied upon the statements that were made to him by the said Edward Roby; and influenced thereby, agreed to execute a quit-claim deed for his quarter interest in said premises. That said Edward Roby prepared an instrument in writing, which he said was a deed conveying said quarter interest, and read the same to your orator and his wife, and they relying upon the said Edward Roby, and believing he had read said deed correctly, then signed this deed; which transaction was on the 12th day of January, 1887, and said deed is not the deed which now appears of record as bearing date January 6th, 1887.

And your orator further says, that the said Edward Roby then agreed, as a pretended consideration for the quit-claim deed requested by him, that he would procure a conveyance to the wife of your orator from George F. Harding, for Lots 9, 10 and 11, in Block 30, in Iron Worker's Addition to South Chicago, which were premises occupied by your orator and his family as a homestead; the
229 said Edward Roby representing that the said Harding then had the legal right to said premises, and that it was, in fact, owned by him; that he would also make a quit-claim deed to the wife of your orator of Lots 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, in Block 36 of said Iron Worker's Addition, and also for Lot 8, in Block 30 of said Iron Worker's Addition; and also procure a deed from Lucy Lender to the wife of your orator for Lot 27, in the Subdivision of Lot 1, of Block 7 of said Iron Worker's Addition. And subsequently the said Edward Roby delivered a quit-claim deed, bearing date December 9th, 1886, purporting to be made by the said George F. Harding and

his wife to Carrie Stirmel Colehour, the blanks of which were filled up in the handwriting of the said Edward Roby, and also delivered a a quit-claim deed purporting to convey Lots 1, 2, 3, 4, 5, 6, 7, 8, 9 and 10, in Block 36 of said Iron Worker's Addition, bearing date January 6th, 1887, and another deed quit-claiming Lot 8, in Block 30 of said Iron Worker's Addition, bearing date May 15th, 1888; and another deed from Lucy Lender for said Lot 27, bearing date January 13th, 1887.

But your orator avers that the title to said Lots 9, 10 and 11, in Block 30 of said Iron Worker's Addition was
230 not in said George F. Harding but was vested in George W. Snyder, who purchased the same in 1874. And that your orator has since procured the title from the said George W. Snyder, by deed bearing date November 16, 1888.

That the said Lots in Block 36 aforesaid were not owned by the said Edward Roby, but the title was a part of the trust property aforesaid. That Lot 8, in Block 30, was not owned by the said Edward Roby. That said Lot 27 was in David M. Hillis, as a trustee for your orator and Charles W. Colehour and Edward Roby. And that the title to said Lot 8 belonged to said parties and was a part of the premises now in controversy in this suit. That all of said Lots belonged to the premises, the title of which was vested in your orator, and which he held in trust, as hereinbefore stated; and your orator avers that he received no good or valuable consideration whatever for the deed which he agreed to sign on the 12th day of January, 1887, and that the said Roby took an unfair advantage of your orator in such transaction; and your orator was not advised of the real fact and of his rights until about the time this original bill was filed.

And your orator alleges that he was not deprived of his equitable interest in and to the premises hereinabove set forth by reason of any contract, deed or conveyance made to the said Edward Roby; and that any and all papers purporting to have that effect, were procured by false representations and by fraud.

231 And your orator offers to place the said Roby in statu quo if any conveyance or payment of money is necessary in equity to effect that purpose.

PRAYER.

And inasmuch as your orator is without any adequate relief, except in a Court of Equity, he prays answer, but not under oath, and that upon final hearing a receiver may be appointed; and the said Edward Roby and Charles W. Colehour and your orator be required to relinquish and convey to him all right, title and interest in and to said premises hereinabove described; and that said Receiver may be authorized to make sale of the premises in such parcels as he may deem expedient, and to redeem from the sales made under the Decree of this Court in the Clarke foreclosure proceedings; that the pretended conveyances by your orator and his wife to said Edward Roby may be set aside and declared null and void; that an account may be taken, that the respective interests of the said Edward Roby, Charles W. Colehour and your orator may be established as declared, as being one-fourth to your orator, one fourth to Edward Roby, and one-half to Charles W. Colehour; that the matters and things re-
232 lating to the property hereinabove described may be fully adjusted as between the said parties; and that the net profits arising from said lots may be divided between the said parties in the proportions aforesaid; and that your orator may have such other and further relief as may be equitable and just.

W. C. GOUDY,
Solicitor for Cross-Complainant.

ANSWER OF EDWARD ROBY

To the original bill of Charles W. Colehour, as amended.

234 Filed May 15, 1890.

275 This answer also stands as the answer to the cross-bill of William H. Colehour.

234 STATE OF ILLINOIS, } ss. In the Circuit Court. In
COOK COUNTY. } Chancery.

Charles W. Colehour *vs.* Edward Roby and William H. Colehour.

The separate answer of the defendant, Edward Roby, to the bill of complaint of Charles W. Colehour, the above named plaintiff, as amended.

This defendant answering, says:

First: That he believes that in the year 1871 plaintiff was engaged in the real estate business in Chicago, and that his brother, William H. Colehour, was interested with him in certain parts or branches of the same.

Second: That in the early summer of said year William Hansbrough negotiated with Henry F. Clarke, who represented his brothers and sisters, who were the owners of the land in said bill described, for the purchase of the same, and that an agreement was concluded by which said Clarke, by warranty deed dated July 18, 1871,
235 conveyed to William H. Colehour the said lands for the consideration of $100.000; of which $10,000 was paid in cash, a mortgage of $4,000 upon part of said property running to Mary P. M. Palmer was assumed by William H. Colehour, who gave his notes for $86,000, the residue of such purchase money, bearing interest at the rate of 7 per cent. per annum, and due in 1, 2, 3, 4 and 5 years from date, and secured the same by a trust deed conveying said lands to Voluntine C. Turner; said trust deed containing the usual covenants, with power of sale in case of default in payment of said notes or any or either of them at maturity.

Third: That at the time of said purchase William Hansbrough furnished five thousand dollars of the cash payment made on said purchase to the Clarkes, and Wesley Morrill furnished the other five thousand dollars. That such purchase was made under an arrangement that Morrill should furnish five thousand dollars, giving to said Charles W. Colehour one-sixth interest, Francis M. Corby one-sixth, and Morrill keeping one-sixth interest in the purchase. That there was then no arrangement whatever

between said Morrill, Corby and said Charles W. Colehour, by which said Charles W. Colehour was to pay back any part of said sum of five thousand dollars, but in case of sale of the land said Morrill was to receive out of the proceeds his said five thousand dollars and interest thereon before any part of the proceeds should be paid to said Charles W. Colehour or Francis M. Corby. That said William Hansbrough furnished his part of said purchase money, amounting to five thousand dollars, on or before July 31st, 1871, and William H. Colehour then delivered to him, said William Hansbrough, a paper writing or deed, in the words and figures following, to wit:

DECLARATION OF TRUST: WILLIAM H. COLEHOUR TO WILLIAM HANSBROUGH.

"CHICAGO, ILL., July 31st, 1871.

"KNOW ALL MEN BY THESE PRESENTS, that the four hundred and six acres this day bought of H. F. Clarke by me in my name, is one-half the property of Wm. Hansbrough—he having bought the one-half and paid the one-half of the cash payment, to wit: five thousand dollars; and as the same is sold, he to have one-half of the profits.

236 WILLIAM H. COLEHOUR. [SEAL.]

Witnessed by

C. W. COLEHOUR."

That, at that time, said Charles W. Colehour had not the other five thousand dollars, but on the following day, August 1st, 1871, said Francis M. Corby and Wesley Morrill borrowed upon their joint note of the National Bank of Commerce of Chicago, the sum of five thousand dollars; which it was then agreed by them that said Morrill should pay, and which he, said Morrill, did pay with his own money. And said sum of five thousand dollars, so borrowed by said Corby and Morrill, was by them given to said Charles W. Colehour on the first day of August, 1871; and was by him placed with the five thousand dollars he had received from Hansbrough, making ten thousand dollars, which he on that day paid as the said down

payment on said purchase from the Clarkes. And on the same day said William H. Colehour made, executed and delivered to the said Francis M. Corby, Wesley Morrill and Charles W. Colehour, a certain deed in the words and figures following, to wit:

DECLARATION: WILLIAM H. COLEHOUR TO CORBY, MORRILL AND CHARLES W. COLEHOUR.

"CHICAGO, ILL., August 1, 1871.

KNOW ALL MEN BY THESE PRESENTS that F. M. Corby, Wesley Morrill and Chas. W. Colehour are together jointly and equally interested in one-half of the four hundred and six acres of land situated in Hyde Park, Cook County, Illinois, this day, to wit: July 18, 1871, bought of H. F. Clarke and others; they having advanced one-half of the purchase money advanced in cash, to wit: ten thousand dollars, they paying five thousand dollars for the purchase of the same. It is hereby agreed that out of the profits, if any, to be realized from the sale of said lands, the said parties above jointly shall be entitled to and receive the one-half of the net profits from any sale of said land.

Witness my hand and seal this first day of August, 1871.

"WM. H. COLEHOUR. [SEAL.]"

It was at that time distinctly understood that neither said Morrill, Corby or Charles W. Colehour should in any way agree or become obligated to pay any portion of the deferred purchase money.

Said Hansbrough did not at the time of such purchase, or at any time afterwards until the latter part of the year
237 1874 or first part of 1875, know that said Morrill had any interest in said purchase, or in said lands.

Said instruments above mentioned constituted the only written agreement between said parties or any of them at the time of said purchase.

Fourth: It is not true that after the Great Fire of October, 1871, said Morrill and Corby, by any instru-

ment in writing, conveyed their interest in said land unto said Charles W. Colehour, the plaintiff herein. But on the contrary, after the fire of 1871, said land having depreciated in value in the market, and said Charles W. Colehour, Francis M. Corby and Wesley Morrill feeling that they might be liable to said William H. Colehour for the unpaid balance of the purchase price of an undivided half of said land, frequently talked over the matter, and came to the conclusion that the best thing to do with that was to get out of it, and not to in any way be known in it, in order to avoid any liability, either to William H. Colehour or his creditors, or to the Clarkes, the vendors of said lands. At that time, which was the winter of 1871–2, both said Charles W. Colehour and William H. Colehour and said Morrill and Corby supposed and believed, that the said instrument dated August 1st, 1871, given by said William H. Colehour to said Corby, Morrill and Charles W. Colehour had been destroyed in the Great Fire. And, after divers and numerous meetings together, it was agreed between said Morrill, Corby and Charles W. Colehour, that said Corby should give said Morrill his note for one-third of said five thousand dollars so advanced by said Morrill and Charles W. Colehour to give his note to said Morrill for another third of such five thousand dollars; and that then each of said three persons should lose his third of such five thousand dollars and abandon and surrender all interests in the said land to the said William H. Colehour, upon his agreement that he would not call upon them or either of them to pay any of the balance of said purchase money. And thereupon the said Charles W. Colehour, Wesley Morrill and Francis M. Corby in pursuance of said agreement, did turn over and surrender all of their claims upon said land to said William H. Colehour; which was done on or
238 about the first day of May, in the year 1872. It was agreed by all said parties that said paper, showing their claim upon said William H. Colehour and interest in the profits, was lost and there was nothing left to show what it ever contained, and that it was settled without anybody outside knowing anything about it; that no deed should be given that might betray the knowledge of any liability on the part of either said Corby, Morrill or Charles W.

Colehour to any outside person; and the whole interest in the said undivided half of said land and the profits thereof was thus surrendered and relinquished to William H. Colehour.

Said Charles W. Colehour did not pay the note he so gave to said Morrill for one-third of said five thousand dollars, but afterwards renewed the same by giving another note or notes of the same or about the same amount which he never paid, and said Charles W. Colehour never paid one dollar of the said purchase money paid down as aforesaid of ten thousand dollars.

For a long time, to wit: From the 1st day of May, A. D. 1872, until October 18th, A. D. 1873, said Charles W. Colehour had no right, title or interest in said land, or in said declarations of trust, or either of them; and had no claim upon the profits of said land.

Fifth. It is not true that on the 16th day of August, 1873, the said William H. Colehour bought the interest of said Hansbrough or at any other time.

Sixth. It is not true, that neither of the owners of said lands were able to pay the interest on said debt, but on the contrary William Hansbrough paid the interest on the said note for four thousand dollars payable to Mary P. M. Palmer, viz: $200 on December 6th, 1871, $200 on June 1, 1872, and $200 on December 2nd, 1872; and said Hansbrough also paid on July 18th, 1872, the interest upon the $86,000 of notes and the interest upon the overdue interest, amounting to $6,125.35. Nevertheless the interest and part of the principal being in arrears, in the latter part of summer, A. D. 1873, said Henry F. Clarke caused said Voluntine C. Turner to advertise said lands for sale under the trust deed to secure the payment of said deferred purchase money; and set the time for sale to take place on or about the 11th day of September, 1873.

239 At that time Mr. William C. Goudy represented Charles W. Colehour and William H. Colehour, and was their legal adviser. And said Henry F. Clarke got said Voluntine C. Turner to go and see Mr. Goudy. And said Goudy informed said Turner that if sale was

made, it would make the title uncertain; and it would be a very risky thing because the fire had occurred, and the place for holding the sale was destroyed. And said Clarke concluded he had better not hold that sale. And said Clarke met said Charles W. Colehour at said Goudy's office and told said Charles W. Colehour that Mr. Goudy thought it was not going to be a very good title, and said that he had been a little hasty; and, that he had better abandon the sale; and, that if he, said Charles W. Colehour, would pay the expense up to that time, the attorney's fee and cost of advertising, he would abandon the sale, and have nothing more to do with it. This defendant had prepared the advertisement and had caused the same to be published, but had not been the attorney for said Henry F. Clarke or his brothers and sisters or either of them in any other manner or for any other purpose. Said Charles W. Colehour and William H. Colehour had applied to this defendant to postpone the sale. But this defendant had refused to do so; and had referred them to said Henry F. Clarke; and told them, he, this defendant, would obey the order of said Henry F. Clarke in the premises. And after said agreement had been made between said Henry F. Clarke and Charles W. Colehour, said Henry F. Clarke stated to this defendant, that if said Colehour would pay this defendant his fees and the expenses of advertising, this defendant might let the sale go down; and directed this defendant to so manage it that his fee should be paid by said Colehour, and that said Clarke should not be called upon for any part thereof, or of the expenses. And said Charles W. Colehour promised to pay the said fee and expenses to this defendant. And this defendant released the said Clarkes, at the request of said Henry F. Clarke made as aforesaid, from all obli-
240 gation to refund to this defendant the amount paid by him for such advertisement, and to pay this defendant his fee for preparing such advertisement.

This defendant paid for publishing said advertisement; and had the certificate of publication ready for the trustee to use in making sale upon said trust deed, when said sale was stopped by Henry F. Clarke as aforesaid, and neither of said Clarkes ever refunded the money so paid, or paid this defendant his said fee; but left the same, according to

said agreement, to be paid to this defendant by said Charles W. Colehour or William H. Colehour.

Seventh. This defendant had never acted as the attorney of said Clarkes or either of them, except, that at the request of Henry F. Clarke he drew the said advertisement, and caused the same to be published, and handed a copy thereof to said Henry F. Clarke to deliver to the said trustee, Voluntine C. Turner, to obtain his signature thereto for publication, and when the same was returned by said Henry F. Clarke, this defendant caused the publication thereof, as before stated. And this defendant never in any manner acted as the attorney of said Clarkes, or either of them, except in the preparation of said advertisement, and the publication thereof, as before stated, and in reading over the trust deed and answering the question of said Henry F. Clarke as to whether he could lawfully cause sale to be made thereunder. And this defendant told said Clarke he believed that a lawful sale could be made thereunder. But said Henry F. Clarke took the advice of Mr. Goudy and his opinion, and overruled the advice of this defendant, and stopped the sale as aforesaid.

This defendant did not, after said advertisement, and before the day fixed by it for the sale of said land, go to said Charles W. Colehour and propose to him to act as his and William H. Colehour's attorney in protecting said land from sale under said trust deed, or to take care of, or protect, said land against foreclosure proceedings; and this defendant did not offer to act as attorney for William H. Colehour and said Charles W. Colehour, or either of them in that matter. This defendant had no conversation with said Charles W. Colehour or William H. Colehour in any manner suggesting any such arrangement, and no
241 such arrangement was ever in any manner by any one suggested, to the knowledge of this defendant, and no such arrangement as is alleged in the seventh division of said bill, in any manner ever existed.

Eighth: It was not agreed at any time that said plaintiff herein should have sole management, charge or sale of said property. It was not agreed at any time that

this defendant should attend to legal matters in regard to the same. It was not agreed at any time that said plaintiff, Charles W. Colehour, should receive for managing said property the sum of five thousand dollars per year, or any other sum. There never was any agreement or arrangement to which this defendant was a party, or of which this defendant had any knowledge, whatsoever, that said Charles W. Colehour should have any compensation for any services in connection with the said property. There was no such arrangement or agreement made, as is alleged in the eighth division of said bill.

Ninth: This defendant has no knowledge as to whether the said William H. Colehour made, executed or delivered to said Charles W. Colehour an instrument bearing date May 29, 1873, which said bill alleges in the ninth paragraph thereof. This defendant never heard of any such instrument, or of any such arrangement as therein mentioned, until he read the averments concerning the same in the bill in this case. No such paper was ever shown to this defendant; and it was never suggested in any manner that said Charles W. Colehour was to receive any compensation for any services that he might render touching said land. This defendant never consented to any such arrangement or paper, and never approved the the same, and never took any instrument subject thereto. This defendant denies that such paper was made at the date it bears, or at any time prior to 1888, and says he believes it was made to defraud the defendant.

The pretended contract, wherewith it is sought to charge this defendant as consenting to, and approving said pretended instrument, and taking his interest subject-thereto, is not in writing, or signed by this defendant or
242 any person by this defendant thereunto authorized in writing; and is not manifested or proved by any writing signed by this defendant; and this defendant sets up and claims the benefit of the provisions of Chapter 59 of the Revised Statutes entitled: Frauds and Perjuries, against and in bar of each and every averment contained in the ninth and tenth divisions or paragraphs of said plaintiff's said bill.

Tenth: This defendant saith that on the 16th day of August, 1873, there was no arrangement made touching said land, or the rights and interests of this defendant, between the said Charles W. Colehour and William H. Colehour, or either of them, and this defendant. This defendant never saw the paper alleged in the tenth division or paragraph of said bill, purporting to bear date the 16th day of August, 1873, and never heard of its existence prior to the year 1889; and this defendant verily believes that the same was made up in the year 1888, to defraud this defendant. This defendant never assented to any such instrument or arrangement, and never made any such agreement as is in said pretended instrument stated. Said declaration of trust was never assented to nor accepted by this defendant; and from the date of said pretended instrument said plaintiff has never acted under said instrument, and no such instrument has had any existence as defining the interests of this defendant or of any other party in connection with him.

The pretended contract, wherewith it is sought to charge this defendant as accepting, and assenting to the pretended instrument, copied, and set forth in the tenth division of said plaintiffs' bill of complaint, purporting to bear date August 16, 1873, is not in writing, signed by this defendant, or by any person by him thereunto authorized in writing; and is not manifested or proved by any writing signed by this defendant; and this defendant sets up and claims the benefit of the provisions of Chapter 59 of the Revised Statutes, entitled "Frauds and Perjuries" against and in bar of each and every averment of such
243 pretended contract, declaration or agreement by this defendant; and against each and every the averments of said tenth division or paragraph of said amended bill.

And this defendant further says that on or about the 28th day of December, A. D. 1872, said William Hansbrough assigned his interest in the said land to Levi D. Boone, and endorsed upon said instrument delivered to him bearing date July 31st, 1871, above copied and set forth, an assignment in the words and figures following, to wit:

HANSBROUGH TO BOONE.

"For value received I hereby assign, set over and transfer unto Levi D. Boone, all my right, title and interest in and to the within contract of purchase of land.

Witness my hand and seal this 28th day of December, A. D. 1872.

WM. HANSBROUGH. [SEAL.]"

On the 15th day of August, 1873, said Hansbrough received from said Levi D. Boone, a power of attorney, bearing date on that day, and acknowledged on that day, authorizing him, said Hansbrough as the attorney of said Boone, to sell and convey all of said Boone's interest in said instrument and in said land; and on the 16th day of August, 1873, the said Hansbrough as attorney in fact for said Boone contracted and agreed to sell all said Hansbrough's interest in the said premises for the sum of $67,200—$16,800 to be paid to Henry F. Clarke and others upon the trust deed to V. C. Turner in cash, and $15,000 per year to be paid for three years, and due the 18th day of July, in each year, at interest at 7 per cent, and the balance of $5,400 to be paid in 1, 2 & 3 years from said date, with interest at 6 per cent to be secured by the notes of the purchaser, or of this defendant; the papers to date from that day, and said down payment to be made within ten days after the title had been examined and found good, or in such time as should be sat-
244 isfactory to said Henry F. Clarke. By reason of some misunderstanding or failure to agree with said Henry F. Clarke, or some question about the title, the intended purchaser did not take said land under said contract, and the panic of September 19, 1873, coming on, the contract fell through; said contract was in fact an option or offer by said Hansbrough, upon computation of the sum of money that he wished to receive out of said lands, and said Henry F. Clarke was to refund to him the amount that he had advanced with the interest, if such sale could be carried through; but owing to the panic said contract in that form could not be carried out. And said William Hansbrough proposed to this defendant to sell to some other person; and offered to pay this defendant a com-

mission of $1,000 if this defendant would sell the said property or interest for him to any one for the price of $20,466.87. And said William Hansbrough proposed a sale thereof to Charles W. Colehour, and that this defendant should take an interest with said Colehour in the purchase thereof; and offered to accept as part payment therefor this defendant's promissory notes for the balance of such $5,400, bearing date August 16, 1873, after deducting therefrom, or applying as part payment thereof, a commission of $1,000, to be paid to this defendant for effecting such sale. Said Charles W. Colehour stated that he had no money which he could pay to said Hansbrough, and it was finally agreed between said Hansbrough and said Colehour and this defendant, that said Hansbrough would sell his interest for $20,466.47, of which $1,000 would be the commission allowed to this defendant, $4,400 should be in the notes of this defendant, bearing date August 16, 1873, (the date said Hansbrough had made said computation and bearing interest from that date), and $15,066.47 should be in the note of William H. Colehour, secured by second mortgage or trust deed on the north three-quarters of the east fractional half of said section 17, parcel of the land, purchased of said Clarkes as aforesaid. Said agreement was arrived at on the 18th day of October, 1873; and said
245 promissory notes of this defendant to said William Hansbrough, and also said promissory note of said William H. Colehour, secured by trust deed on said land, were on that day given to said Hansbrough, all being dated back to August 16, 1873. And on said 18th day of October, 1873, said Charles W. Colehour, in the presence of said William H. Colehour and this defendant, wrote upon the back of said declaration of trust to said William Hansbrough, bearing date July 31, 1871, an assignment in the words and figures following, to wit:

BOONE BY HANSBROUGH TO CHARLES W. COLEHOUR AND EDWARD ROBY.

" In consideration of $15,066.47 to me in hand paid by Chas. W. Colehour, and $4,400 paid by Edward Roby, I hereby assign, sell and transfer all interest in the within

instrument and the land therein mentioned to Chas. W. Colehour and Edward Roby.

CHICAGO, October 18, 1873.

LEVI D. BOONE, [SEAL.]
By WM. HANSBROUGH, *his Attorney in fact*."

Which instrument said Hansbrough signed and sealed in the presence of all said parties.

Said Charles W. Colehour began to write the date of said instrument as August, but struck it out and dated it on the day when said assignment was actually made. And said William Hansbrough entered said transaction in his book as made October 18, 1873, for $20,466.87, of which $1,000 was paid as a commission to this defendant.

It was agreed that inasmuch as this defendant furnished all the cash payments, and said Charles W. Colehour nothing, this defendant should have one undivided half of one undivided half of said lands, as charged with the payment of said note to said Hansbrough (of $15,066.47) given by William H. Colehour, and said notes for $86,000, and said note to Mary P. M. Palmer for $4,000 secured on said land by the said trust deed to said Voluntine C. Turner; and the said Charles W. Colehour wrote out in full with his own hand, and the said William H. Colehour signed and sealed and delivered to this defendant an instrument in writing in the words and figures following, to wit:

DECLARATION OF TRUST.
WILLIAM H. COLEHOUR to CHARLES W. COLEHOUR AND EDWARD ROBY.

246 "I, William H. Colehour, being the owner in fee of the south half of section eight and part of the north-east quarter of same, and of the north-east three-quarters of section 17, all in T. 37, N., R. 15 E., 3rd P. M., Cook County, as conveyed me by deed of Henry F., Robert D., Harriet S., and Sarah J. Clarke, dated July 18th, 1871, and recorded August 2nd, 1871, in Cook county, Ills., do hereby acknowledge that after the payment of all

sums of money due on any notes of mine secured upon said land, the payment of all interest payable on account of said notes, the payment of all moneys advanced on account of any development of said land, or on account of any industry on or beneficial to said land, and the payment of all sums of money advanced by C. W. Colehour and Edward Roby, or hereafter to be advanced on account of anything pertaining to said land, then Edward Roby shall be entitled to the one-fourth part of the net profits of said land; Charles W. Colehour shall be entitled to the one-half of the net profits of said land, and I shall be entitled to the one-fourth part of the net profits of said land.

This shall apply to the heirs, executors or administrators of any and all of the parties above mentioned.

But no assignment of any interest shall be made without the written consent of all the parties hereto first obtained.

And this division of interest is in consideration of money advanced by the above mentioned Roby and C. W. Colehour on behalf of said land, and subject to any agreement of mine with reference to said land heretofore made by me concerning any division into lots, conveyances, management thereof, or of any indebtedness incurred in behalf of said land.

And I hereby make, constitute and appoint Chas. W. Colehour my true and lawful attorney in fact, to sell said lands by lot or block as he may deem best, and to give deeds for the same with proper notes back for deferred payments; and to do this shall have full power to sign my name to any deed or instrument, and acknowledge the same, in as full a manner as I could do myself, with Edward Roby as his substitute; and I do hereby confirm all acts done by my attorney in fact, and also his substitute in this behalf, as my acts and as binding on me or my heirs, executors or administrators.

WILLIAM H. COLEHOUR. [SEAL.]"

Said last mentioned instrument was given to this defendant by the said William H. and Charles W. Colehour in the latter part of October or in November, A. D. 1873. The moneys therein mentioned, advanced by this defend-

ant, were the said one thousand dollars allowed this defendant as commissions by the said William Hansbrough, the said promissory notes given by this defendant to said William Hansbrough, and about $1,000 in money advanced by this defendant for publishing notices of an auction sale of lots which was held on the 27th of October, 1873, upon said premises, and for printing and posting notices, and for railroad tickets, and divers other things for the benefit of the said land, and to keep up the local trains running to that vicinity, and to pay the expenses of agents and customers to look at and purchase said land.

Said William H. Colehour had before that time made a certain agreement with the Nes Silicon Steel Company and with Esther E. Taylor, who were interested in the lands adjoining, and said Silicon Company was interested in 26 and two-thirds of the same land, such agreement being for a uniform division of the section into lots and blocks with streets and alleys, and for such conveyances and management as should open the streets through from north to south and benefit the locality.

Said William Hansbrough had never been a party to any arrangement for paying Charles W. Colehour a compensation. And no arrangement of any such character was in any manner spoken of or considered between the said William H. Colehour and this defendant. This defendant paid the said notes for $4,400, so as aforesaid given to William Hansbrough by him. But the said note of $15,066.47 so given by said William H. Colehour to said William Hansbrough was never paid, nor any part thereof. Not a dollar has ever been paid thereon by either of said Colehours.

At that time, to wit: in the fall of 1873, Charles W.
248 Colehour claimed to have advanced to William H. Colehour a part of $3,225 paid by him on account of the interest on said Clarke mortgage, and also claimed to have incurred some expense amounting to some two or three hundred dollars in procuring the location of a rolling mill upon part of said land by the Nes Silicon Steel Company; but the large interest agreed to be given to said Charles W. Colehour, amounting to an undivided half of said land, or the profits thereof, was given to him for the benefit of his knowledge and experience and upon the understanding that he should devote himself to the business connected

with said land, and he was to have no other consideration whatever for his work.

Eleventh: Said plaintiff did not, in December, 1873, or at any other time, cause the south half of said section eight to be subdivided and platted; and did not in 1873 and 1874 cause streets to be thrown up or ditches to be dug, except as he acted with said William H. Colehour, and as the tenant in common; and said plaintiff never caused bridges to be built across the Calumet River. Said plaintiff did not cause sidewalks to be built fronting said lots, and did not devote his entire time to the improvement of the property and the sale of lots in the subdivision. On the contrary, said William H. Colehour prepared a plat and subdivision of said north half of said section as early as August, 1873, and in the same year said William H. Colehour united with Esther E. Taylor in subdividing the north half of said section eight (8) (which north half included part of the premises first in said bill above described), and the subdivision of the south half of said section was completed and acknowledged, by said William H. Colehour, under the contract or agreement with the Nes Silicon Steel Company, concerning the subdivision and management of said property, so as to subdivide the 26⅔ acres in the north-west corner of the south half of said section eight (8) a half mile in length from east to west, in which said Silicon company was interested; and if any sidewalks were built, or
249 streets made, thrown up or graded, or ditches dug, they were done out of the proceeds of the sale of lots in said south half of said section; and most of them were done as part of the purchase price of such lots; the bridges built across the Calumet River were built about the year 1875 by the village of Hyde Park, and were procured to be done mainly by the efforts of this defendant.

Said Charles W. Colehour did not cause to be thrown up or graded any streets. And less than eight miles of streets were thrown up on said lands purchased of said Clarks; the throwing up of which streets cost not more than $2560. There were no ditches dug on said land purchased of the Clarks; and none outside of there were

dug at the expense of said property, except extending the ditches of 103d street about a quarter of a mile to the river, at a cost not exceeding $100.

Twelfth: Charles W. Colehour did not have charge of said land from 1872 to 1879, but the same was in charge and possession of said William H. Colehour; and whatever was done thereon or concerning the same by Charles W. Colehour was done under the foregoing power of attorney as the attorney and agent of said William H. Colehour.

Said Charles W. Colehour did not expend out of his own pocket large sums of money thereon, or any sum whatsoever; and did not out of his pocket cause a depot or school-houses to be built; and none were built at the expense of said property. Charles W. Colehour spent no money for such purposes, but on the contrary, said Charles W. Colehour took and applied the proceeds of said land to his own use in large and small sums. This defendant is informed and believes that said Charles W. Colehour for the purpose of plastering the large building which then belonged to him in Chicago next east of the Board of Trade, having a front of 100 feet on Washington street and 192 feet on Exchange Place and being four stories high, took some $20,000 of the proceeds of lots in said subdivision of section eight (8) and applied the same to pay for such plastering. That he also exchanged lots in said subdivision
250 for wood-work and finishing in said building, amounting to $10,000 more and upwards. That he also applied more than $20,000 of the proceeds of such lots to his own use in conducting litigations with Henry Clews & Company, with the Union National Bank of Chicago, with the South Park Commissioners, and with divers other persons; that he applied the proceeds of said lots to the support of himself and his family, and the conduct of his own business and operations; and that he did so continue taking and applying to his own use a large proportion of the proceeds of said land from the 27th day of October, 1873, until he went into bankruptcy as hereinafter stated, and since that time.

On the 22nd day of September, 1886, said Charles W.

Colehour sold for a valuable and sufficient consideration, and by deed conveyed, quitclaimed and released unto said William H. Colehour all his right, title and interest in and to the south half and the north-east quarter of section eight (8) and all of section 17, both in Township 37, Range 15, East of 3rd Principal Meridian in Cook County, Illinois; and thereafter said Charles W. Colehour had no right, title or interest in or claim upon the said lands or any part thereof.

From 1875 to 1889 said Charles W. Colehour lived upon two lots in the said Subdivision of the south half of said section eight, with his family; which two lots he claimed to be the separate property of his wife up to the time of her death in 1887, and since that time, of her daughter; which lots said Charles W. Colehour claims to have been purchased by his said wife with her own money, which she owned before her marriage with him.

On the 30th day of August, A. D. 1878, said Charles W. Colehour filed his petition in bankruptcy in the District Court of the United States, in and for the Northern District of Illinois, alleging that he was indebted in large sums aggregating $819,675.45 or thereabouts, alleging that this defendant was one of his creditors, alleging that some nineteen other lawyers were his creditors for legal
251 services rendered to him in the years 1873, 1874, 1875, 1876, 1877 and 1878, alleging that he was a bankrupt, and praying that he might be adjudged to be a bankrupt; and thereafter he was by the said Court declared and adjudged a bankrupt, and all his property and interests of whatsoever name or nature were, according to the course and practice of such court, duly conveyed to Bradford Hancock, Esq., who was appointed his assignee in bankruptcy; and thereafter said Charles W. Colehour had no right or interest therein. Said Charles W. Colehour, having in 1876, for a sufficient and valuable consideration, conveyed all his interest in and to said land and all claims thereon to said William H. Colehour, and having no interest in said land or the proceeds thereof, or in the title in said William H. Colehour, did not mention the same, or any part thereof, in his inventory filed in said District Court of the United States, in such proceeding in bankruptcy; and said Charles W. Colehour had not at said

date, to wit: on the 30th day of August, A. D. 1878, any right, title or interest in or to, or claim on said lands, or any of the proceeds thereof.

Thirteenth: It is true that, from 1873 to 1878, said Charles W. Colehour had an office in Chicago. This defendant is not aware that he had one on said land. This defendant endeavored to obtain cognizance of what was being done upon and concerning the said land, and what was received from the sale of lots and what was done with it; but this defendant was unable to ascertain and did not know how much was received nor what was done with it. This defendant supposed that said Colehour kept all the entries concerning the lands in a single book in his office from which this defendant procured a copy down in some time in 1877 or 1878, but this defendant has discovered, within five years past, that said Colehour has other books of the same kind, whose entries give a very different story from the book which he examined.

It is true that a considerable amount was expended in improvements in throwing up streets and ditches and building some sidewalks and a railroad station, but the amount so expended did not exceed $12,000; and except the amount furnished by this defendant, it was all done
252 by exchange for lots or in part payment for lots in said subdivision. This defendant furnished the architect's plans and specifications for said railroad station or depot, and for one or two large houses, and paid for the same some $615; and also furnished money for lumber, besides becoming indebted for $1,500 and upwards for lumber used in building the said railroad depot and other improvements upon said land.

This defendant says that he verily believes, and upon his information and belief charges, that said plaintiff received and applied to his own use more than $50,000 from the sales of said land.

This defendant further says that, on March 21st, 1874, he furnished said plaintiff $5,000; on May 7th, 1874, he furnished said plaintiff $1,000; on May 27th, 1874, he furnished said plaintiff $4,926.25; on June 3d, 1874, he furnished said plaintiff $1,000; on June 3d, 1874, he

furnished said plaintiff $900; on June 16th, 1874, he furnished said plaintiff $747 to use in paying interest on said debt to said Clarkes, and for the benefit and protection of said land.

Fourteenth. This defendant admits that, prior to 1878, there was an arrangement with the Clarkes by which lots were released from the lien of the Turner Trust Deed, upon a certain sum being paid on each lot; that afterwards said Clarkes refused to grant further releases.

Fifteenth. This defendant admits that, on October 24th, 1881, the said Clarkes filed a bill in chancery in the Circuit court of Cook county, to foreclose said Turner Trust Deed.

Sixteenth. No such arrangement was made, with this defendant, for one-quarter of the net profits of said land, as is alleged in said plaintiff's bill; and this defendant did not, at the time in said bill alleged, assure said Charles W. Colehour and said William H. Colehour, or either of them, that he knew certain facts which would prevent the foreclosure of said Turner Trust Deed, and did not at any time make any such assurance or statement; and when said bill was filed this defendant did not make any such assurance or statement to said plaintiff or William H. Colehour, or that he could defeat said foreclosure suit.

Seventeenth. This defendant did not, at any time, conceive any design to take advantage of said Charles W. or William H. Colehour. This defendant did not hold any confidential position as attorney or friend of said Charles W. or William H. Colehour or otherwise, and did not, in said suit or otherwise, pretend to act with or for the interest of said Charles W. or William H. Colehour. On the contrary, said Charles W. Colehour was himself a lawyer, William C. Goudy acted for and was the attorney and adviser of said Charles W. Colehour and William H. Colehour before and in September, 1873, and continued to act for them and as their attorney and adviser from that time until November or December, 1885, when the

suit of Clarke against Colehour and others for foreclosure in said bill mentioned came on for trial.

In March, 1874, William H. Richardson brought and prosecuted a suit for said William H. Colehour and Charles W. Colehour, and in the latter part of the same year said Goudy defended another suit for them and acted for them in said case until its close in the Supreme court in the latter part of 1876. John Borden, Leffingwell & Johnson, and John L. Thompson, acted as the attorneys for said Charles W. Colehour and William H. Colehour in divers proceedings and suits between 1873 and 1878, and in 1878 Charles J. Johnson was the attorney and legal adviser of said William H. Colehour and Charles W. Colehour. And divers other persons were the attorneys of said Charles W. Colehour and William H. Colehour from 1872 to the bringing of this suit.

And this defendant says that he did not become the attorney of said William H. Colehour and Charles W. Colehour in August, 1873, or at any other time, by accepting a contract for one-fourth of the profits of the said land, in consideration of an agreement on his part to betray the interests of the Clarkes as clients of this defendant. That he never during the said years from 1873 to 1878 was the attorney for said Colehours, or either of them, except in a very few cases under a special arrangement made as to each case. That from the month of January, 1878, he acted for his own interests and adverse to said Charles
254 W. Colehour. That he proved up a claim in bankruptcy against said Charles W. Colehour for attorney's fees; that he accepted a retainer from Crane Brothers Manufacturing Company on or about August 25, 1879, to prosecute their claim against said Charles W. Colehour's estate, and as attorney for Crane Brothers Manufacturing Company, as well as on his own behalf, opposed the discharge of said Charles W. Colehour; that E. G. Asay and W. C. Asay acted as attorneys for said Charles W. Colehour, prosecuting these proceedings for discharge. This defendant also brought divers other suits and proceedings in 1878 and 1879 and 1880, against Charles W. Colehour and William H. Colehour, and prosecuting the same to conclusion.

During the time from 1873 to 1880, divers other

attorneys acted for said Charles W. and William H. Colehour.

In September, 1875, the Mechanics' National Bank of Chicago brought an action against said Charles W. and William H. Colehour upon a personal debt of said Charles W. Colehour, not in any manner connected with said lands. And said Colehours knew of said suit while it was pending, and permitted judgment to be entered against them in the Superior court of Cook county in said suit on the 6th day of December, 1875, for $2,265.50 and costs, and permitted an execution to be issued thereon and levied on some five hundred lots in the said subdivision, which were sold on said execution, and said Colehours permitted the time of redemption to elapse, and a sheriff's deed to be issued for said lots purporting to convey the same to the Mechanics' National Bank of Chicago, which was recorded in Chicago, and yet said Colehours never in any manner notified this defendant of said suit or judgment; and this defendant had no notice thereof in any manner until said Sheriff's deed had been issued and recorded, and until on or about December 22, A. D. 1877, when this defendant for the first time discovered the same while examining the indexes in the office of the Recorder of Deeds of Cook County for conveyances by William H. Colehour.

Eighteenth. It is true that onthe 3d day of October, A.
255 D. 1878, a judgment was recovered against said William H. Colehour and Charles W. Colehour in the Superior Court of Cook County for $4,113.58 and costs in favor of Oliver H. Horton, Receiver; which is the same judgment intended to be mentioned and referred to in the 18th division of said bill; but this defendant had no notice of the suit in which said judgment was recovered until after the lands had been sold in the bill mentioned in division or paragraph 18 of said bill, and the sheriff's deed had been issued to Roland R. Landis therefor, to which judgment and sheriff's deed this defendant asks leave to refer for a more full and particular answer to the averments of said plaintiff's said bill concerning the same.

This defendant says that if said judgment was recovered on a debt contracted to raise money to pay on said Clarke in-

debtedness, such debt was incurred because the said Colehour had applied the proceeds of the said lots that ought to have been used to pay said Clarkes to their own use. This defendant had not in his possession any notes belonging to said plaintiff and his said brother. This defendant had no conversation with said plaintiff or his said brother concerning said Landis' title, and made no representations to them or either of them as alleged; and never offered to trade for the same; and did not say that he could do better probably by buying said lots in his own name than in the name of William H. Colehour or Charles W. Colehour, and this defendant did not say that he would hold the titles in trust for all three under the same trust it had formerly been held by said William H. Colehour, or upon any trust whatever.

This defendant says that about the month of April, 1884, this defendant first heard of said Landis' title, or learned of the same by examining an abstract of title which he borrowed from William A. Montgomery, Esq., attorney for the Clarkes in said foreclosure case, And this defendant, without consulting with any one, called upon said Landis and asked him to sell to this defendant. but was unable to make an agreement with said Landis.
256 This defendant had no consultation after that with any one concerning said Landis' title until said Landis came to the office of this defendant and offered to sell said land to this defendant for cash on that day; and this defendant agreed with said Landis for the purchase of said land at $600; and said Landis immediately and on the same or the next day prepared his deed for said land to this defendant, and this defendant gave to him the sum of $600 in cash, and this defendant received the deed of said Landis in his own right, and without any consultation with, and without being in any manner for the benefit of, any other person whatsoever. This defendant paid for said Landis' title with his own money, and took and holds the same for his own benefit, use and behoof.

This defendant did not agree to hold the title and interest purchased by him from said Landis in trust, as alleged in the eighteenth division of said plaintiffs' said bill.

And as to each and every averment of trust alleged in said 18th division of said plaintiffs' said bill, this defendant says

that such averment is not true. And further this defendant says that the pretended trust in said eighteenth division of said bill claimed and averred, was and is not manifested or proved by a writing signed by this defendant, but was and is utterly void and of no effect. And this defendant sets up and claims the benefit of the provisions of said Chapter 59 of the Revised Statutes, entitled "Frauds and Perjuries," against and in bar of all such averments, pretenses and claims of trusts.

This defendant further shows that on or about the 2d day of July, 1877, said Charles W. Colehour fraudulently caused a deed to be made of a large parcel of said land worth over $30,000, to one Jared Myers Clarke for the purpose of defrauding this defendant, and without the knowledge of this defendant, and afterwards and on or about the 14th day of January, A. D. 1878, for like fraudulent purpose, caused a deed of a large number of lots in said subdivision, worth some $50,000, to be made to one Jacob Bremer, which are the same lots of which the plaintiff al-
257 leges that the title came to be vested in James E. Clarke, who is the brother-in-law of said plaintiff. And this defendant knew nothing whatever of either of said matters and conveyances to said Jared Myers Clarke or said Jacob Bremer, until he discovered the record of the conveyance to said Clarke about the 1st of January, 1878, and the record of the conveyance to said Bremer about January 16th, A. D. 1878, on the record of deeds. That he then taxed the said Charles W. Colehour with his said fraud, and from thenceforth, for eight years the relations of this defendant with said Charles W. Colehour were wholly adverse.

Nineteenth: It is true that at the June term of the Superior Court of Cook County on the 4th day of June, A. D. 1878, judgment was recovered against said Charles W. Colehour in favor of Charles B. McCoy for $3,700, and costs; that execution was duly issued and levied thereon; and the lands so levied upon were sold to George F. Harding; and a deed issued to him. But this defendant says, that such title was not held for the benefit of said plaintiff or said William H. Colehour. And said title was

paid for with the money of this defendant, and was conveyed to this defendant for his own use, benefit and behoof. And said Charles W. Colehour and William H. Colehour never had any interest therein.

Against every claim of trust set up or averred in the nineteenth division of said plaintiffs said bill this defendant sets up said Chapter 59 of the Revised Statutes in bar thereof, and says that no such trust as averred was manifested or proved by a writing signed by said George F. Harding or by this defendant.

Twentieth: It is true, that on or about the 24th day of September, 1879, a judgment was recovered in the Superior Court of Cook County against said Charles W. Colehour and William H. Colehour in favor of the Crane Brothers Manufacturing Company, for the sum of $3,591 and costs, which sum was a debt upon a note given by said Charles W. Colehour to said company for an elevator or elevators put in the said building of the said Colehour on Washington street, in the city of Chicago; that
258 excecution was issued thereon and levied upon the lands in said bill described; which were sold to this defendant in September, 1876, and this defendant says that he did buy said judgment of said Crane Brothers Manufacturig Company for the sum of $750; of which he paid $500 in cash, and $250 in his own note, payable to the order of said company. Said Charles W. Colehour did not pay $250 of such purchase money, nor any part thereof. And this defendant bought said judgment with his own money and for his own use, benefit and behoof; that there was no agreement between this defendant and Charles W. Colehour concerning the same; there was no agreement between this defendant and said Charles W. Colehour concerning the sale made on said judgment; and there was no trust in any manner agreed upon. There was none talked of. From the time of the purchase of said judgment and for more than a year prior thereto until long after this defendant had received said sheriff's deed for the land sold thereon this defendant had no conversation or communication with said Charles W. Colehour, concerning the said judgment of sale or title. This defendant at all times claimed said judgment as his own, from the time of his

purchase thereof, and claimed the purchase of the lands thereunder as his own, and never as trustee in any manner.

Said Charles W. Colehour never furnished this defendant any money or any valuable thing to purchase any of the said judgments or judgment titles, and never in any manner whatsoever contributed in the slightest degree to the purchase thereof.

This defendant sets up and pleads and claims the benefit of said Chapter 59 of said Revised Statutes in bar of each and every averment and claim of trust in said 20th division of said plaintiffs' said bill contained, because that there was, and is, no writing signed by this defendant manifesting or proving the said pretended trust or trusts, or either of them.

Twenty-first. That on or about the 1st day of May, 1879, this defendant had no communication with said Charles W. Colehour concerning said lands before that time held in trust by William H. Colehour, and this defendant did not suggest that William H. Colehour should deed said land or any part of it to said Charles W. Colehour. And this defendant verily believes that said William H. Colehour did not make, execute or deliver to said Charles W. Colehour the deed by him averred prior to the year 1888; and then it was prepared and put upon the record for the purpose of defrauding this defendant and defeating his title.

This defendant had no notice of any such deed until some time in the year 1889, when examining the indexes in the office of the Recorder of Deeds of Cook County to find said pretended agreement bearing date August
259 16, 1873, and recorded July 14, 1888, and which in or about the month of April, 1889, appeared upon an abstract of title, then made, in which this defendant afterwards for the first time was notified of its existence by finding said deed noted in said indexes. This defendant says that he did not approve of any such deed.

Said Charles W. Colehour did not take possession of the said land, but from September 22d, A. D. 1876, hitherto he stated both orally and in writing, both in conversation and under oath, that William H. Colehour was in possession

of the said land down until late in the year 1887, and after this defendant's purchase from William H. Colehour of all his interest in the said land.

That said William H. Colehour after giving to this defendant the deed of said land in said bill mentioned turned over the possession thereof to this defendant; and notified the tenants to attorn to and pay the rent to this defendant; and this defendant entered into the possession thereof, and has held the same openly and exclusively during the whole of the years 1888 and 1889, without any objection on the part of said Charles W. Colehour, or any claim by the said Charles W. Colehour of any right of possession, charge or control whatsoever. This defendant cut the hay and received the rents for all the fenced lands in 1888, and exercised the most positive acts of ownership, and the most notorious and clearest acts of ownership over said lands in 1888 and in 1889. During 1889 this defendant farmed all of the said lands that were under fence and capable of farming, being about 150 acres thereof, under his judgment titles and said deed from William H. Colehour; and of the lands that were not under fence this defendant has been from the spring of 1887 in constant possession, keeping off trespassers, using the same for picnics, building and moving buildings, and doing the most positive and distinct and exclusive acts of ownership; to which neither the said Charles W. or William H. Colehour have in any manner objected.

260 This defendant says that it is not true, that on or about the first day of January, 1887, this defendant had any such negotiation with, or caused to be made or made any such representations to William H. Colehour as in said bill alleged.

But, on the contrary thereof, when the said bill for foreclosure by said Clarkes against said William H. Colehour and others was prosecuted, this defendant was made a party defendant thereto. Said bill was amended February 4, 1882, and there were several hundred defendants. A large number of the lot owners defended by different attorneys, other than this defendant, and who appeared without any retainer or request by either of said Colehours. Charles W. Colehour did not defend, but an

answer was put in for William H. Colehour and ninety-nine other defendants by Goudy & Chandler. Afterwards an amended answer was put in for William H. Colehour, by W. C. Goudy, his solicitor. This defendant answered said bill for himself, and put in the answer for the heirs and personal representatives of Levi D. Boone, as the owners of said note for $15,066.67; and filed and prosecuted a cross-bill in their behalf; and also answered for eight lot owners or holders of notes and mortgages against lot owners; in all of which, his interest was distinct from, and in part adverse to, said William H. Colehour. Said Charles W. Colehour did not answer either said bill or cross-bill, and did not in said suit claim any interest in said premises; but he acted as attorney in place of W. C. Goudy, in taking testimony. He was a witness. And at the trial of said cause he introduced the above mentioned deed of 1876 to William H. Colehour, and proved that all the title he, said Charles W. Colehour, ever had was vested in and remained in said William H. Colehour, except as divested by said judgment sale.

This defendant, by his answer put in soon after the beginning of said suit, alleged, that said William H. and Charles W. Colehour had sold and conveyed large numbers of parcels of said land for sums exceeding $234,000 in the aggregate, and had applied the proceeds to their
261 use; and further that said William H. and Charles W. Colehour permitted an execution to be issued on a judgment in favor of the Mechanics' National Bank against them, and to be levied on large numbers of parcels of said land of the value of over $150,000, and said parcels being sold to satisfy said judgment, said Colehours permitted the time of redemption to expire, and a sheriff's deed to be issued to the purchaser. And this defendant in said answer claimed that by reason of the application of so large an amount of said property to their own use, by the said William H. and Charles W. Colehour, for all of which the said William H., as the holder of the legal title was responsible, this defendant was entitled to the only equity of redemption in said land after the satisfaction of said Clarke's mortgage. And this defendant conducted his part of the case to sustain his said answer, and after Mr. Goudy abandoned the case, Mr. Henry S. Mon-

roe and Charles W. Colehour represented the said William H. Colehour, and acted as his attorney until after the decree was entered.

Further answering, this defendant says that in the latter part of the year 1886, about the month of September, the said pretended deed from William H. Colehour to Charles W. Colehour, not being on record, and William H. Colehour being in possession of the said land, and representing himself to be so in possession, and Charles W. Colehour also representing that said William H. Colehour was the holder of the title and in possession, said Crane Brothers Manufacturing Company's judgment having been levied upon all the lands in said subdivision, of which the title remained in said William H. Colehour at the date of the entry of said judgment, the same were sold severally to this defendant, and the sheriff's certificate was issued to this defendant for such sale.

Afterwards Richard D. Lender, who lives in the vicinity, having occasion to call upon this defendant, upon his own business, and that of other persons, inquired of this defendant concerning the condition of the title to the lots occupied by said William H. Colehour and his family;
262 being lots eight, nine, ten and eleven in block thirty in Ironworkers' Addition to South Chicago; and stated that Jacob Bremer claimed the right to collect the rent thereof from said William H. Colehour said Lender, also, at various times during the latter part of said year, 1886, inquired of this defendant concerning the condition of the title of all said Ironworkers' Addition, and of the lots that had been sold to different parties, and for which they claimed to have paid Colehour, but which had not been released from said Clarke mortgage; and this defendant told said Lender that Charles W. Colehour had testified, according to this defendant's recollection, that he had conveyed all interest in said lands, or had read the deed from himself to William H. Colehour, dated in 1876, in evidence; that if any interest remained after that release, it passed from said Charles W. Colehour by his assignment in bankruptcy, and the judgments had been levied on all possible interest he might have, both before and after bankruptcy, and his interest had been sold, and that this defendant believed he, said Charles W. Colehour,

had no interest whatever in said premises. This defendant also told said Lender, that he believed the title, which Bremer was setting up, had been cut off by a sheriff's sale and deed to George F. Harding of lots 9, 10 and 11 in Block 30; and that lot 8 had been sold to this defendant on the said Crane Brothers Manufacturing Company's judgment. This defendant also said to Lender, that said William H. Colehour was responsible for the proceeds of the lots sold and conveyed by him, and that this defendant was entitled to more than $80,000 out of the first proceeds of the land at the time the Clarkes begun their suit to foreclose; and this defendant had claimed in that suit, that in equity, he was entitled to an account against William H. Colehour and Charles W. Colehour, and the payment to him of some $80,000 out of the lands after payment of the Clarke mortgage, before either Colehour could touch a dollar of it. That the Colehours had put the title of the most valuable part of said land in Jared
263 Myers Clarke, and another very valuable part in Jacob Bremer, to defraud this defendant and beat him out of his interest in the land in 1877. And this defendant was not disposed to do anything for said William H. Colehour.

This defendant told said Lender he thought Mr. Harding could get possession of said lots from William H. Colehour under his judgment title; and that this defendant would not help William H. Colehour, as said Lender asked him to do, to keep him in possession of said lots nine, ten and eleven. Said Lender at various times asked this defendant to meet with said Colehour and settle with him their disputes and claims. This defendant told said Lender that the time of redemption on said Crane Brothers Manufacturing Company judgment had not expired, and that he had not the dower of the wife of said William H. Colehour in any of said lands, and that if said William H. Colehour wished to settle with this defendant, and surrender to this defendant all of the said lands, it would probably be worth more to this defendant than any claim against William H. Colehour; and if the wife of said William H. would unite with him in a deed of all interest, it might be an object to this defendant above releasing said William H. Colehour from the claims of this defendant, to give to said William H. Colehour or his wife some

small amount of property. And afterwards said Lender told this defendant that said William H. Colehour and his wife would like to meet this defendant, and fixed the 6th day of January, 1887, as the time for such meeting. And this defendant caused to be prepared two deeds of said lands and other property held by said William H. Colehour, and went to meet said Colehour, intending to demand that he should make such conveyances if he wished to settle the claims of this defendant against him. Said William H. Colehour and his wife sent in word that they were detained, and appointed the 12th of January, 1887, to meet this defendant; and on that day they came with said Lender and met this defendant, about ten o'clock in the forenoon, and remained with this defendant
264 until after 4 o'clock in the afternoon. This defendant submitted said sheriff's certificate and the said deeds which he had had drawn to them. And said deeds were read over a number of times by William H. Colehour and his wife, and negotiations were had concerning the same, which ended in the agreement, that upon the execution of said deeds this defendant pay $400 by causing conveyance of a certain lot worth that sum, and to which said William H. Colehour, or his wife, had no claim, title or interest, to the wife of said William H. Colehour, that he should, within a reasonable time, procure George F. Harding and his wife to convey the title they had to lots 9, 10 and 11, in said block 30, to the wife of said William H. Colehour, and that if lot 8, in said block 30, should not be redeemed from sale to this defendant on the judgment of Crane Brothers Manufacturing Company, and this defendant should be entitled to a deed thereof, this defendant would convey the same forthwith to the wife of said William H. Colehour. This defendant also agreed to act as attorney for said William H. Colehour in defending a suit of the administrators of William F. Coolbaugh against him, said William H. Colehour, and others, and also to *release said William H. Colehour from all personal demands and claims which this defendant had against him*, and pay said William H. $15 in money. And thereupon said William H. Colehour and his wife executed, acknowledged and delivered to this defendant the deed in said bill mentioned, dated January 6,

A. D. 1887, and recorded in book 1971, on page 529, and said William H. Colehour executed and delivered said other deed. And this defendant gave to said William H. Colehour, in consideration of said deeds so by said William H. Colehour given to him, *a full release of all the said personal claims and demands which this defendant then had against him*, said William H. Colehour, stating that this defendant had received such deeds and the property therein assigned in full of all demands to said date, and this defendant paid him $15 in cash. And this defendant at once procured said George F. Harding to
265 convey to Carrie Stirmel Colehour, wife of said William H. Colehour, said lots 9, 10 and 11, in said block 30. This defendant also immediately caused to be conveyed to Carrie Stirmel Colehour said other lot, which she and said William H. Colehour within two months sold for $400, and received said sum in full. This defendant also when he had received a sheriff's deed of said lot 8, in block 30, upon said Crane Brothers Manufacturing Company judgment, conveyed the same forthwith to said Carrie Stirmel Colehour, wife of said William H. Colehour, and this defendant also has defended the said suit of said Coolbaugh's administrators against said William H. Colehour and others.

Soon after said deed from said William H. Colehour to this defendant was recorded, and at divers times during the summer of 1887, said William H. Colehour expressed to this defendant his regret that the description of the land embraced all of section 8, and did not exclude those parts of the north half of said section of which the title had never been in said William H. Colehour. But said William H. Colehour did not pretend that he had not conveyed all interest in said lands in said deed embraced, which he had originally received, as well as all the interest of said Charles W. Colehour, which he (Charles) had conveyed to him, said William, in 1876, as aforesaid. And afterwards and from time to time, the said William H. Colehour has acknowledged the receipt of said several deeds agreed by this defendant to be given to him, and of the full consideration for the deeds of him, said William H. Colehour, to this defendant, and that he was entirely satisfied with the same. And said William H. Colehour

has at all times, and from time to time ratified and confirmed the said sale, by accepting the consideration thereof, and by delivering the possession of the said premises and notifying his tenants who were upon parts of the land that he had sold said land to this defendant, and that they should pay rent to or deliver up the places occupied by them to this defendant; and in divers other ways.

266 All said negotiations and purchase were made by this defendant, fairly and in good faith, and without misrepresentation, and if there is any averment in the 21st division of said bill to the contrary thereof, this defendant says that such averment is not true.

JUDGMENT. McCOY v. WILLIAM H. COLEHOUR.

This defendant further says that at the June term A. D. 1878, of the Superior court of Cook county, Illinois, to wit: on the 4th day of June, A. D. 1878, Charles B. McCoy recovered judgment against said William H. Colehour for three thousand and seven hundred dollars, besides costs of suit; that execution was duly issued to the sheriff of Cook county therein, within a year from the entry of said judgment, to wit: on the 5th day of June, A. D. 1878; which execution was duly returned by said sheriff, no part satisfied. That afterwards, to wit: on the 24th day of April, A. D. 1885, execution was duly issued to the sheriff of Cook county on said judgment, which was by him duly levied on Lot 4, Block 3, Lots one 1, 2, 10, 11 and 12, Block 4, all of Block 9, Lot 16, Block 26, Lots 15, 16, 17 and 18, Block 28, Lots 9, 10, 11 and 13 in Block 30, Lot 33 in Block 35 and all Block 46 in Ironworkers' Addition to South Chicago, a subdivision of the South half of Section 8 in Township 37, Range 15, in said county.

That the title to all said lands so levied on appeared by the record to be in said William H. Colehour at the date of said Judgment, to wit: June 4th, A. D. 1878, and no conveyance of any part thereof by him had then been recorded.

That afterwards said Sheriff sold all said lands to

George F. Harding on said Execution, and the same not having been redeemed the said Sheriff afterwards, and on the 13th day of October, A. D. 1886, duly conveyed the same to said George F. Harding by deed bearing date on that day, and which was on the 21st day of October, A. D. 1886, duly recorded in the office of the recorder of deeds of said Cook County as Document No. 765,067, in Book 1,960 of Records, at page 507.

And afterwards said George F. Harding and his wife
267 by deed conveyed unto this defendant all said lands except said lots 9, 10 and 11, Block 30, which this defendant had before that time procured said Harding to convey to the wife of said William H. Colehour, and the north part of said Block 9, which this defendant had before that time procured said Harding to convey to David M. Hillis for the use and benefit of this defendant.

Twenty-second. This defendant further answering, says that it is not true that after the Clarkes refused to give releases, or at any other time, that it was agreed between said William H. Colehour and Charles W. Colehour that matters between them and this defendant should be considered square; that it is not true that this defendant accounted with the said Colehours or agreed to release them from their indebtedness to him for the moneys by them held in trust and applied to their own use; and that it is not true that this defendant had any notes belonging to said trust at that time, or has applied any such notes to his own use.

Twenty-third. It is not true that in 1886, or any other time, this defendant acting as the attorney of said Charles W. and William H. Colehour advised the commencement of a forcible detainer suit by said William H. Colehour against John Thurman. But such proceeding was in fact begun in June, 1885, by Charles W. Colehour in the name of William H. Colehour, of his own motion, and therein said Charles W. Colehour alleged that the title and right to restitution was in William H. Colehour.

It is true that the wife of said Thurman brought a suit against said William H. Colehour and Charles W. Colehour for personal injuries inflicted on her by them, and

obtained a judgment against them for $1,500. But it is not true that this defendant agreed to pay a part of such judgment, and this defendant never was and is not in any manner obligated to pay any part of such judgment.

Said plaintiff did not, while acting as attorney for William H. Colehour, honestly endeavor to promote the best interests of the equitable owners of said land. This
268 defendant did not take any advantage of plaintiff's financial position. This defendant did not sustain confidential relations as said plaintiff's attorney, and had nothing to do with said plaintiff concerning said judgments and execution sales. Plaintiff never contributed a dollar towards the purchase of said judgments or judgment titles; and this defendant never made any agreement or promise to said plaintiff concerning said judgments or judgment titles.

Twenty-fourth: This defendant had no agreement with plaintiff in relation to defending said foreclosure suit, and was not the attorney of said William H. Colehour and Charles W. Colehour therein; but, on the contrary, this defendant litigated the case for himself, and claimed, as in his answer above set forth, from the beginning of said foreclosure suit in 1881; that said Colehours had defrauded this defendant in applying to their own use the proceeds of the sales of said land more than sufficient to have paid the entire debt of said Clarkes, leaving said Clarke debt unsatisfied; and that this defendant was entitled to all the first proceeds of said land, after paying said Clarkes, to the amount of some eighty thousand dollars, before said William H. Colehour, for himself and as assignee of said Charles W. Colehour, could receive anything. After decree was entered said William H. Colehour filed an appeal bond; but this defendant procured the transcript, and paid $965 for it, and assigned errors thereon in his own name, and filed the same in the Appellate court. This defendant paid the stenographers who took the testimony in the case for copies furnished him, and said Colehours paid nothing. This defendant made the abstract of the record in said case, and paid a stenographer some $500 to assist him in doing it. This defendant wrote all the briefs for the par-

ties that he had represented in said court; and paid for printing the abstract, and all of the briefs that were filed in the Appellate court. When the decree was affirmed in the Appellate court, this defendant procured the tran-
269 script, and paid for the same, and took the same to the Supreme court, and paid for the same, and, having purchased all the interest of William H. Colehour by deed, as aforesaid, this defendant, in prosecuting the appeal in the Supreme court, used the name of said William H. Colehour, *as he had the right to do*, with his own name, and those that he had theretofore represented; and paid all the expenses in said Supreme court; and prepared and filed a petition for rehearing, and paid all the expenses thereof; and neither said Charles W. Colehour nor William H. Colehour did anything whatsoever to aid in the prosecution of said appeal or writ of error or contributed one dollar toward the same.

This defendant did in good faith defend said foreclosure suit in all the courts; but not as the attorney of said Charles W. Colehour or William H. Colehour.

Charles W. Colehour never defended said suit at all, except as he acted as attorney or solicitor for William H. Colehour; and never claimed to be in any manner interested in said land, during the pendency of said suit, from its commencement to its close.

Twenty-fifth: It is true that this defendant claims that neither said plaintiff nor said William H. Colehour has any right, title or interest in said property; and this defendant claims the same as his own, subject only to the amount due thereon to redeem the same from said sale on said decree in favor of said Clarkes.

This defendant has filed in this court his three bills to compel said plaintiff (Charles W. Colehour) and James E. Clarke and Jared M. Clarke, who held the title to portions of said land in trust for the legal owners thereof, to convey such portions of said land to this defendant. And if it be true that said Clarkes have deeded to said Charles W. Colehour the titles conveyed to them, then said Cole-
270 hour holds the same in trust for this defendant; and will, upon the hearing of said cases be required to convey the same to this defendant.

25½. This defendant says he believes it is true that William H. Colehour did convey to Richard D. Lender the lots and land in the amendment to the bill mentioned as conveyed to him, and did receive from said Lender certain notes for part of the purchase money named in the deeds of conveyance to said Lender, secured by trust deeds running to Charles W. Colehour, trustee, upon the lots so conveyed to said Lender; that if the same were intended to be held in trust there was no writing taken manifesting or proving such trust; and such transactions were without the knowledge or consent of this defendant.

And afterwards said Lender claimed to own said lots and lands, and the same were subject to the dower of his wife. And this defendant made no representations to said Lender that were not true. And afterward and on the 23d day of December, A. D. 1886, this defendant bought, and said Lender, his wife joining in the deed, in consideration of the sum of two thousand dollars to him paid, duly conveyed all his right, title and interest in and to all said lands to this defendant, by deed; which was afterwards recorded in the office of the Recorder of Deeds in and for Cook County as document 803,953 in Book 2,000 of Records at page 481, and which is the same deed intended to be described in said amended bills. And this defendant refers to said deed, and, by reference, makes the same a part of this his answer, for the full particulars thereof. And this defendant holds the title acquired thereunder for his own use and benefit.

Twenty-sixth: It is true that under the decree in said suit of said Clarks' sufficient of the said property was sold by the master on December 30th and January 29th last to satisfy said decree. That this defendant caused each of said lots and parcels to be bid upon separately, so that they were sold separately; and this defendant believes that the several lots and parcels were sold
271 for much less than their real value; and that if this defendant could sell his said land free from the cloud cast by the claim of the said Charles W. Colehour thereon by this suit, and said deeds to said Jared Myers and James E. Clark, this defendant could realize more than $250,000 above the amount of said sale upon said foreclosure decree.

Whether said plaintiff has got the condition of this defendant's title to be such that it cannot be sold for one-tenth of its value, this defendant leaves the plaintiff to make such proof as he may deem best.

Twenty-seventh. This defendant believes it to be true, that neither said plaintiff nor said William H. Colehour have any means to pay said Clarke debt or redeem any part of said property and that they are insolvent, but this defendant denies that he is unable to pay any amount that is required to redeem his said land.

Said plaintiff has not demanded of this defendant a conveyance of his said titles, but this defendant says that if he should demand it this defendant would refuse to make any such conveyance; and this defendant says that he, this defendant, is the owner of said lands, and that he owns the same for his own use exclusively.

Twenty-eighth. Whether the list of lands annexed to the bill shows the list sold under said foreclosure proceeding, and the amount at which each lot was sold, this defendant begs leave to refer to the record of sales, for verification.

PLAINTIFF GUILTY OF LACHES.

The plaintiff has known of all said sheriff's deeds, and said deed from William H. Colehour, and this defendant's claims thereunder, for a long time, and has unreasonably delayed bringing his suit until now, and now brings the same, to annoy and embarrass this defendant's title, at a time when he knows this defendant wishes to sell the same; and this defendant says that the said complainant has been guilty of laches, and is not entitled, because of his laches, to any consideration or relief from a Court of Equity.

GENERAL PLEA OF STATUTE OF FRAUDS.

And this defendant further says that as to each and
272 every the said pretended trusts, charged as against this

defendant, the said pretended trusts are not, nor is either of them, manifested or proved by any writing signed by this defendant; and this defendant prays and claims, as to each and every the pretended trusts, the benefit of the statute of frauds; and claims the same benefit thereof as if he had pleaded the same in bar of the several averments of trusts in said bill as against this defendant. And as to each and every pretended agreement in said bill contained, touching the sale of land or any interest therein, wherewith it is sought to charge this defendant, this defendant says that there is no note or memorandum thereof in writing, signed by this defendant, or any person thereunto by him lawfully authorized in writing; and as to each and every such matter, this defendant claims the benefit of the said statute of frauds, and claims that he ought not to be put to answer or defend against such claims and agreements, touching the sale of lands or any interest therein, and touching any pretended trusts, upon oral evidence only; and he demands that proof be required, such as is demanded by the statute of frauds in such cases; and that every such pretended trust claimed against this defendant by the plaintiff, which is not manifested and proved by writing signed by this defendant, be held and decreed by this court to be utterly void and of no effect.

BANKRUPTCY PROCEEDINGS.

And this defendant further shows that, on the 31st day of August, A. D. 1878, this defendant filed his petition in bankruptcy in the District court of the United States for the Northern district of Illinois, and therein scheduled as part of his assets his said interest arising under said declaration of trust by said William H. Colehour to William Hansbrough, and also said declaration of trust by said William H. Colehour to this defendant; and such proceedings were thereupon had that this defendant was duly adjudged bankrupt, and all his assets were conveyed to his assignee in bankruptcy, to wit: on the 7th day of September, A. D. 1878; and that but one claim and that
273 for a small amount, was proved against the estate of this

defendant in bankruptcy; and that thereafter, and on the 23d day of November, A. D. 1880, this defendant was by said District court duly discharged from all debts and claims provable against his estate and which existed on the 31st day of August, 1878; and thereafter, to wit: on the 4th day of February, A. D. 1882, the assignee in bankruptcy of this defendant sold the assets of this defendant, including all his interest derived under the said declarations of trust, unto this defendant, and duly assigned and conveyed the same, including all interest in the said lands embraced in said declarations of trust from said William H. Colehour to this defendant, and said sale was duly approved and made absolute by the said District court; and from thence forward this defendant has been the owner of said declaration of trust from said William H. Colehour to this defendant, and also of an undivided half of the said declaration of trust from said William H. Colehour to William Hansbrough, and of all interests and claims arising under the same, or either of them.

Twenty-ninth: If there is any other matter or thing in said bill not hereinbefore sufficiently answered, this defendant denies the same to be true, in the manner and form as the same is in said bill alleged. And now, having answered said bill, he prays to be hence dismissed with his costs and charges most wrongfully sustained.

EDWARD ROBY,
Defendant, pro se.

275 ORDER. Entered May 15, 1890.
Touching pleadings. And submission of case by the parties.

Comes the plaintiff, by Charles W. Colehour, in person, and by Henry S. Monroe, Esq., his solicitor; the defendant, William H. Colehour, and plaintiff in the cross-bill, by W. C. Goudy, Esq., his solicitor; and Edward Roby, defendant to the bill and cross-bill, also comes in person; and it is agreed that the answer of said Roby to the amended bill shall stand as his answer to the cross-

bill; and that general replication shall be considered as
276 filed thereto; that Charles W. Colehour waives the right to answer said cross-bill, but admits the same; and that a certified copy of the record of a deed from William H. Colehour to George W. Snyder, Document 200,484, recorded in Book 856, page 1, is considered as read in evidence.

And thereupon the case is submitted to the court on the evidence heard, for decision upon the bill and cross-bill.

ORDER, granting leave to complainant's solicitor to amend bill.

Entered June 12, 1890.

Entitled in the case of Charles W. Colehour vs. Edward Roby et al.

On motion of the complainant's solicitor, leave is granted the complainant to amend his bill of complaint herein, instanter.

And on motion of defendant's solicitor the answer on file to stand as the answer to said amended bill; the replication to stand to said answer.

277 AMENDMENTS TO BILL.

Filed June 12, 1890.

State of Illinois, County of Cook. ss: In the Circuit Court.

Charles W. Colehour vs. Edward Roby et al. In Chancery.

The complainant, by leave of court, further amending his bill, says: That the defendant, Roby, has produced an instrument, of which the following is a copy, to wit:

Here follows the declaration of trust, in the hand writing of Charles W. Colehour, and signed William H. Colehour, which is found in the decree to be the true declara-
278 ration of trust. (Rec., 285–7; 289.) It is printed in full in the answer of Roby, ante, pp. 65–6, in its order.

279 And your orator further states that said defendant Roby claims that the said instrument was made, executed

and delivered by the said William H. Colehour; and that the same expresses the contract and agreement of the parties; whereas your orator claims and insists that the said instrument was never delivered; and never became operative; and does not express the agreement between the parties; but that the instrument bearing date August 16th, 1873, which is copied and set forth in your orator's original Bill herein, is the true and only Declaration of Trust, executed and delivered by said William H. Colehour, for the benefit of said Roby; and that the same was, and is, the only instrument agreed on between your orator and said defendants William H. Colehour and Edward Roby; and that the same contains the true agreement between the parties, and Declaration of Trust, concerning the lands therein described.

And having amended his Bill as aforesaid, your orator prays relief, the premises considered, as in and by his said Bill he has already prayed.

CHARLES W. COLEHOUR.
By H. S. MONROE,
His Solicitor.

H. S. MONROE,
Slr. of Counsel.

280 (Endorsed) Circuit Court of Cook County. Amendments to Bill.
Filed June 12, 1890.

HENRY BEST, *Clerk.*
H. S. MONROE, *Solr.*

The order last above quoted had made the Answer on file to stand as the Answer to the Amended Bill, and the Replication to stand thereto; therefore the case was at issue and ready for final decision upon the submission made in that order.

FINAL DECREE.

282 Entered at the May Term of the Circuit Court on June 12th, 1890.

283 State of Illinois, County of Cook. ss: In the Circuit Court of Cook County.

Charles W. Colehour vs. Edward Roby and William H. Colehour. Bill in Equity.

William H. Colehour vs. Edward Roby and Charles W. Colehour. Cross-Bill in Equity.

Edward Roby vs. James E. Clarke and Charles W. Colehour.

Edward Roby vs. Jared Myers Clarke and Charles W. Colehour.

Edward Roby vs. Charles W. Colehour.

284 This cause coming on for final hearing upon the original Amended Bill in Colehour vs. Roby et al., the Answer of the defendant thereto; the Cross-Bill of William H. Colehour and the Answer of Edward Roby thereto; and the Replications. And it appearing that the said Charles W. Colehour has elected not to make answer to the Cross-Bill, but confesses the same to be true; and also upon the pleadings in the last three above named cases; and the Court having heard the evidence, and arguments of Counsel, doth find:

That Henry F. Clarke, Robert D. Clarke, Harriet S. Clarke and Sarah J. Clarke conveyed to William H. Colehour by deed dated July 18, 1871, which was recorded August 2, 1871, and by confirmatory deed dated July 7, 1873, and recorded August 22, 1873, the following described real estate:

Here follows the description by metes and bounds of the lands in Section 8 above described at the beginning of this abstract, and also a description of the North three-quarters of the East fractional ½ of Section (17).

285 The description excepts the railroads and gives the amount of land as 406 acres, and proceeds:—

Subject to a mortgage for $4,000 to Mary P. M. Palmer, and that $10,000 was paid in cash for such convey-

ance, and the said William H. Colehour executed his notes for $86,000, balance of the purchase money, bearing interest at 7 per cent.; payable in 1, 2, 3, 4 and 5 years; and for the purpose of securing such notes executed a trust deed conveying said premises to Voluntine C. Turner.

That William Hansbrough, Charles W. Colehour, Wesley Morrill and Francis M. Corby were interested in the net profits to be derived from the sale of said premises.

That the said William Hansbrough sold and assigned his interests in said profits to Charles W. Colehour and Edward Roby.

And that the said Charles W. Colehour acquired the interest therein of Francis M. Corby and Wesley Morrill.

The court finds, that, at the time of the delivery of said Hansbrough's assignment to Colehour and Roby, said Roby paid to said Hansbrough four thousand and four hundred dollars ($4,400) by his notes, subsequently paid.

That in the year 1873 a contract and arrangement was made between William H. Colehour, Charles W. Colehour and Edward Roby for the purpose of subdividing
286 and selling said land, and realizing profits therefrom.

That in order to have written evidence of such contract and arrangement that said William H. Colehour during the month of October, 1873, executed the following Declaration of Trust, which was accepted by the said Charles W. Colehour and Edward Roby, and which is still in full and binding force, to wit:

DECLARATION OF TRUST.
WILLIAM H. COLEHOUR to CHARLES W. COLEHOUR AND EDWARD ROBY.

"I, William H. Colehour, being the owner in fee of the south half of section eight and part of the north-east quarter of same, and of the north-east three quarters of section 17, all in T. 37, N., R. 15, E. 3rd P. M., Cook County, as conveyed me by deed of Henry F., Robert D., Harriet S. and Sarah J. Clarke, dated July 18th, 1871, and recorded August 2d, 1871, in Cook County, Ills., do hereby acknowledge, that after the payment of all sums of money due on any notes of mine secured upon said land the payment of all interest payable on account of said notes, the payment of all moneys advanced on account of any development of said land, or on account of any industry on or beneficial to said land, and the payment of all sums of money advanced by C. W. Colehour and Edward Roby, or hereafter to be advanced on account of anything pertaining to said land, then Edward Roby shall be entitled

to the one fourth part of the net profits of said land, Chas W. Colehour shall be entitled to the one-half of the net profits of said land. and I shall be entitled to the one-fourth part of the net profits of said land.

This shall apply to the heirs, executors or administrators of any and all of the parties above mentioned.

287 But no assignment of any interest shall be made without the written consent of all the parties hereto first obtained.

And this division of interest is in consideration of money advanced by the above mentioned Roby and C. W. Colehour on behalf of said land; and subject to any agreement of mine with reference to said land heretofore made by me concerning any division into lots, conveyances, management thereof, or of any indebtedness incurred in behalf of said land.

And I hereby make, constitute and appoint Chas. W. Colehour my true and lawful attorney in fact, to sell said lands by lot or block as he may deem best, and to give deeds for the same, with proper notes back for deferred payments; and to do this shall have full power to sign my name to any deed or instrument, and acknowledge the same, in as full a manner as I could do myself, with Edward Roby as his substitute; and I do hereby confirm all acts done by my attorney in fact and also his substitute in this behalf as my acts and as binding on me or my heirs, executors or administrators.

WILLIAM H. COLEHOUR. (SEAL.)"

287 And that the Declaration of Trust purporting to have been made by William H. Colehour of date August 16, 1873, the court finds was not the one agreed upon between said Roby and the Colehours.

That the said William H. Colehour executed to Charles W. Colehour, a power of attorney, dated May 29, 1873, which reads as follows:

Here follows the power of attorney, which is printed in full above, at page 9.

"Know all men by these presents, that I have and by these presents,
288 do hereby make, constitute and appoint Chas. W. Colehour my true and lawful attorney, in fact for me and in my place and stead to take the possession, sole control and charge of and over the following described land, to wit: (This instrument contains a description of all said lands conveyed by said Clarks to Wm. H. Colehour). Over all of which land I give my said attorney absolute power and control: to lay out in lots, blocks and streets; to donate portions thereof to persons or corporations for locations for manufacturing purposes; to subscribe for the stock of any company, pay for the same, and charge the same to me; to make all sales of land in lots or blocks; make deeds in my name, and acknowledge them for me; to receive all money and notes for any deferred payments and collect the same; to act as trustee in all trust deeds, receiving all notes; to borrow money when required, and pledge said notes; to pay all taxes and assessments; to pay off any and all incumbrances of mine, all debts of mine, all notes he may give, for any purposes; to bid in his own name any property sold under pledge of security of mine; to buy up all judgments against me; to employ any lawyer for any of my law business; and pay him to begin any suit; defend any suit for me; to dismiss any of my suits or defenses at his option; to settle any suits; and when the Clarke mortgage for

$86.000, and the Palmer mortgage for $4,000, and all other of my indebtedness now existing or which may hereafter come into existence, are fully paid and the land free of all charges, then this power shall cease.

I hereby agree to pay him out of the proceeds of sales of land, the sum of $5,000.00 each year from the date hereof, for his services, and
289 this power of attorney is made continuous and irrevocable, until such time as the land is free and clear, and until my said attorney is paid all sums he has advanced, and his salary is fully paid.

Hereby ratifying and confirming all my said attorney may do in my behalf, I hereby set my hand and seal this 29th day of May, 1873.

WILLIAM H. COLEHOUR. [SEAL.]

Certificate of Acknowledgment attached, dated June 2, 1875, and signed *Charles G. Harris*, Notary Public.

The Court finds, that the minds of the parties did not agree upon said instrument dated August 16th, 1873; but that the Declaration of Trust above copied was agreed to by all the parties, and was delivered to said Roby as containing the true Declaration of the interest of the parties, and it must be so treated and held.

That in December, 1873, the South half of said section eight, was subdivided and platted into blocks and lots, streets and alleys; the said lots being about 2,000 in number; and a plat was made thereof, which was recorded in the proper office.

That improvements were made by grading streets,
290 making ditches, building bridges and constructing sidewalks.

That thereafter and prior to some time in the year 1878, many of said lots were sold and conveyed by the said William H. Colehour, and the said lots released from the Deed of Trust executed to the said Voluntine C. Turner, to secure the notes executed by said William H. Colehour for a part of the purchase money.

That in 1873 the following part of said premises, to-wit: $26\frac{67}{100}$ acres, situate in the north-west corner of the south-west quarter of Section 8,—495 feet in width north and south by 2,323 feet in length east and west,—was conveyed by the said William H. Colehour with the consent and approval of said Charles W. Colehour, and with the knowledge and approval of Edward Roby to Egbert Gulick, President of the Nes Silicon Steel Company, which was released from the said Deed of Trust. This land is known as the Silicon land.

That on the 22nd day of September, 1876, Charles W.

Colehour quitclaimed, released and conveyed to William H. Colehour all his right, title and interest in and to the said premises described in the deed of the said Charles to the said William H. Colehour.

That on the 1st day of May, 1879, the said William H. Colehour executed a deed to Charles W. Colehour which reads as follows, to wit:

Know all men by these presents that I, WILLIAM H. COLEHOUR (a bachelor) do, *in consideration of one dollar* to me in hand paid by
291 CHARLES W. COLEHOUR of the second part, grant, bargain and sell to Charles W. Colehour the following described land, to wit:

The North half of the South East quarter and the North East quarter of Section 17, T. 37, N., R. 15, E. 3d P. M.

And the following lots and blocks in Ironworkers Addition to South Chicago, being a subn. of the South half of fractional Sec. 8, T. 37, N., R. 15, E. 3d P. M., Cook County, Illinois.

Lots 1 to 18, Block 1; Lots 1 to 23, Bk. 2; Lots 4 & 5, Bk. 3; Lots 1, 2, 10, 11, 12, Bk. 4; Lots 1 to 11, Bk 5: Lot 1, Bk. 7; Lot 1, Bk. 8; Bk. 9; Lots 5 to 14 and 28 to 46, Bk. 10; Lots 40, 41 and 44 to 48, Bk. 11; Lots 47 & 48, Bk. 12; Lots 6 to 48, Bk. 15; Lots 7 to 22 and 25 to 48, Bk. 16; Lots 6 to 41, Bk. 17; Lots 4 to 33, Bk. 18; Lots 1 to 32, Bk. 19; Lots 8 to 30, Bk. 20; Lots 1 to 55, Bk. 22; Lots 1 to 43, Bk. 23; Bk. 24, entire; Lots 1 to 21 and 25 to 48, Bk. 25; Lots 1 to 48, Bk. 26; Lots 1 to 24 and 29 to 39, Bk. 27; Lots 5, 6, 7, Bk. 28; Lots 5, 6, 7, 8, 21, 22, Bk. 29; Lots 8, 9, 10, 11, 18, 19, 20, 25, 26 and 27 to 33 and 45 to 48, Bk. 30; Bk. 31, entire; Lots 10 and 11 and 25 to 48, Bk. 32; Lots 8, 15, 16, 17 and 18 to 29 and 40, 41 and 47, Bk. 33; Lots 2 to 7 and 18 to 32, 39, 42, 43 & 44, Bk. 34; Lots 6, 13, 20, 21, 22, 23, 24 and 25 to 30 and 42, 43 & 44, Bk. 35; Lots 1 to 46, Bk. 36; Block 37, entire; Lots 5 to 48, Bk. 38; Bk. 39 entire; Bk. 40 entire; Bk. 41 entire; Bk. 42 entire; Bk. 43 en-
292 tire; Bk. 44 entire; Bk. 45 entire, and Bk. 46 entire.

Also the following piece of land situate in the county of Cook and State of Illinois: Commencing at the point of intersection of the Lake Shore and Michigan right of way, as located July 18th, 1871, that is the center line of said right of way, with the east and west line of the center of Sec. 8, T. 37, N., R. 15, E. 3d P. M. and running thence on a course North 30° and 30' East 20 chains and 25 links, more or less, to Lake Michigan; thence along the shore of Lake Michigan, on a course South 25° and 30', more or less, East to the intersection of the State line; thence South along the State line to a point 50 feet North of the center of said right of way; thence on a course north-westerly along said right of way to the point of beginning; all in fractional section 8, T. 37 N., R. 15 E. 3d P. M., Cook County, Illinois.

This deed is made and delivered subject to a declaration of trust made by me August 16th, 1873. And the above described land is conveyed subject to the terms of said trust, the original of which declaration of trust is in the possession of Charles W. Colehour, grantee hereof.

I also grant, bargain and sell to Charles W. Colehour the West ½ of North West quarter of Sec. 17, T. 37 N., R. 15 E. 3d P. M., Cook county, Illinois; subject to my declaration of trust of date Feb. 22d, A. D. 1876, held by Charles W. Colehour.

In witness whereof, I have hereunto set my hand and seal this 1st day of May, A. D. 1879.

WILLIAM H. COLEHOUR. [SEAL.]

Certificate of acknowledgment by *Charles G. Harris*, as notary public, bears date May 1, 1879.

Certificate of recording shows it recorded as Doc. 981,155, July 14, 1888, at 11 A. M.

The Decree copies the Certificate of Acknowledgment,
293 signed Charles G. Harris, Notary Public, bearing date May 1st, 1879.

The Decree also states that it was recorded in the Recorder's office of Cook County, Illinois, as Document 981,155, July 14, 1888, at 11 o'clock A. M., and proceeds:

Which was acknowledged on the 1st day of May, 1879; and that such Deed was executed and delivered, by the grantor to the grantee, subsequent to the date of the acknowledgment thereto attached; and that the said Edward Roby knew of the existence of the Deed before execution and delivery of the Deed from William H. Colehour and wife to him, dated January 6th, 1887, in and by which Deed Charles W. Colehour became the trustee in the place of William H. Colehour.

That the said William H. Colehour, joined by his wife, made and executed to the said Edward Roby on the 12th day of January, 1887, the following Deed, to wit:

This indenture witnesseth, that the grantor WILLIAM H. COLEHOUR of the Village of Hyde Park in the County of Cook and State of Illinois, for the *Consideration of One Dollar and other good and valuable considerations* Conveys and Quit Claims to EDWARD ROBY of the City of Chicago, County of Cook and State of Illinois, all interest in the following described real estate to wit: All section Eight (8) and all section
294 Seventeen (17) in Township Thirty Seven (37) North, Range fifteen (15) East of the Third principal meridian, Situate in the County of Cook and State of Illinois.

And Carrie Stirmel Colehour, wife of said William H. Colehour, joins with her said husband in this deed for the purpose of relinquishing her right of dower in and to the said lands above described, and each and every part thereof; and doth hereby relinquish unto the said Roby, grantee above named, all her right of dower in and to the said lands and each and every part thereof.

Dated this sixth day of January, A. D. 1887.

WILLIAM H. COLEHOUR. [SEAL.]
CARRIE STIRMEL COLEHOUR. [SEAL.]

Certificate of Acknowledgment by Richard D. Lender, Notary Public, under his official seal certifies that *William H. Colehour* and *Carrie Stirmel Colehour* his wife acknowledged.

Dated January 12, A. D. 1887.

Filed for Record January 14, 1887.

295 And also the following instrument or assignment, to-wit:

In consideration of One Dollar and other good and valuable considerations I hereby sell, assign, transfer and set over unto EDWARD ROBY *for his own use and benefit*, all interest in all promissory notes and demands due or owing to me on account of the sale of any lands, lots or other property in Ironworkers Additions to South Chicago, or in any part of Sections Eight (8) and Seventeen (17) in Township Thirty Seven (37) Range Fifteen (15) East of the third principal meridian; and in any and all securities on such lands, lots or premises and each and every part and parcel thereof; and all claims to said land and each and every part thereof; and if any title or titles to any parts or parcels of said Sections Eight (8) and Seventeen (17) shall become vested in me at any time hereafter by virtue of any claim that I now have, I hereby grant and convey each and every such parcels to said Roby so as to vest the legal title thereto in him. And I hereby grant and convey to said Roby all claims to said lands, and all legal and equitable titles to each and every part or parcel of said lands which are now vested in me.

Witness my hand and seal at Chicago this Sixth day of January, A. D. 1887.

WILLIAM H. COLEHOUR. [SEAL.]

Certificate of Acknowledgment, by Richard D. Lender, Notary Public, bears date January 12, 1887.

296

That on July 2nd, 1877, William H. Colehour executed a deed conveying to Jared Myers Clarke the following described land:

(Here follows the description by metes and bounds of the Jared Myers Clarke land as given in the pleadings.)

That at the September Term of the Superior Court of Cook County, 1878, a judgment was rendered against Charles W. Colehour and William H. Colehour by the Superior Court of Cook County, in favor of Oliver H. Horton, receiver, &c., for $4,113.58 and costs. That an alias execution was subsequently issued, dated July 3d,
297 1882, thereon, which was levied upon the following described lots and lands, to wit: as set forth in the copy of the following deed, to wit:

Here follows the deed of the sheriff, namely;

DEED.

Sheriff of Cook County to Roland R. Landis.

Dated November 1st, 1883.

Recites the judgment, the issue of execution and levy thereon upon the land, and sale to Roland R. Landis on July 31st, 1882, of the lands described therein.

Conveying the following lots in Ironworker's Addition. Lots 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, Block 15.

Lots 22 and 23 in..... Block 18.
298 All (except Lot 32)..... Block 19.
All..... Block 22.
Lots 17, 18, 19, 20, 21, 22, 23 and 24 in..... Block 26.
Lots 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, and 24 in. Block 36.

Also the North half of the South East fractional quarter of Section 17.

Also the North East fractional quarter of said Section 17, T. 37, N., R. 15.

To have and to hold with the appurtenances thereunto belonging to the said Roland R. Landis, his heirs and assigns forever.

Signed and sealed by the sheriff, and acknowledged
299 November 1st, 1883. And recorded June 6, 1884.

The decree proceeds: "The following is a copy of the deed by which George F. Harding and wife conveyed to Edward Roby on February 9th, 1888, all their right, title and interest in the lands described in said deed, to wit:

Then follows:

Quit claim deed, statutory form.

George F. Harding and Adelaide M., his wife, to Edward Roby.

Dated February 8th, 1888.

Consideration $4,721.00.

Conveys the North three-quarters of the East fractional half of Section 17. The west ½ of the north-west quarter of section 17. The south ½ of section 8. The north one-half of said section 8 lying east of a line drawn from the point where the south line of said north ½ of said section 8 intersects a line drawn through the middle of the right of way of the Lake Shore & Michigan Southern Railroad, North 20° East to Lake Michigan; all said lands being in T. 37 N., R. 15 E. 3rd P. M., situate in the County of Cook and State of Illinois.

300 Certificate of Acknowledgment of George F. Harding and Adelaide M., his wife, dated February 9, 1888, filed for record February 16, 1888.

The Decree proceeds: "That by Deed dated March 26th, 1884, said Roland R. Landis and Ella, his wife,

conveyed to Edward Roby, for a consideration of $600, the lands mentioned in the following deed:

The Decree then gives, haec verba, the deed from Roland Landis to Edward Roby, to wit:

301 DEED.

Roland R. Landis and wife to Edward Roby.

Dated March 26th, 1884.

Consideration $600.

Conveying all the right, title, interest, claim and demand of the party of the first part in and to the N. ½ S. E. frl. ¼; and the N. E. frl. ¼ of Sec. 17, T. 37, R. 15; also all Block 19, except Lot 32, Lots 22 and 23, in Block 18, Lots 25 to 47, inclusive, in Block 15; all of Block 22; Lots 17 to 24, inclusive, of Block 26; Lots 1 to 24, inclusive, of Block 36, of Ironworker's Addition to South Chicago.

This is the full old-fashioned form of Deed, with ha-
302 bendum et tenendum. Signed by Roland R. Landis and
303 Ella Landis, his wife, and acknowledged before a Notary Public March 27, 1884, and recorded June 6th, 1884:

The Decree proceeds: "Which lots and lands were sold under said execution to Roland R. Landis; and Sheriff's Deed was made and delivered to the said Landis, dated November 1st, 1883.

That at the June Term, 1878, a judgment was rendered by the Superior Court of Cook County against Charles W. Colehour in favor of Charles B. McCoy, for the use of Frank W. Harding for $3,700 and costs, on which execution was issued and levied upon the following described premises, to wit: As set forth in the following described copy of a Sheriff's Certificate issued to George F. Harding.

Here follows haec verba:

SHERIFF'S CERTIFICATE.

Sheriff of Cook County to George F. Harding.

Dated May 23, 1885.

Recites the issue of a pluries Writ of Execution from the Superior Court of Cook County issued on a judgment rendered at the June Term, 1878, of said court, in favor of Charles B. McCoy for the use of Frank W. Harding, plaintiff, against Charles W. Colehour, defend-

ant, for $3,700 and costs, dated April 27, 1885. States that by virtue of such writ I, said Sheriff, did on this 23rd day of May, 1885, at 10 o'clock in the forenoon, &c., having duly advertised, &c., sell at public vendue all the
304 right, title and interest of the said defendant in and to the following described tracts or lots of land, to wit:

The N. ¾ of E. frl. ½ of Sec. 17, for $100.

The W. ½ of N. W. ¼ of Sec. 17, for $100.

The S. ½ of Sec. 8, (except Lots 7, 8, 9, 10 and 11 in Block 8, of Ironworker's Addition to South Chicago), for $250.

That part of the N. ½ of said Sec. 8 lying East of a line drawn from the point where the South line of said North half of said Section intersects a line drawn through the middle of the right of way of the Lake Shore & Michigan Southern Railroad land, North 20° East, to Lake Michigan for $50.

All said premises being in T. 37 N., R. 15 E. of the 3rd P. M., in County of Cook and State of Illinois, to George F. Harding for the total sum of $500; said sums being the highest and best bid for the said tracts or lots of land, each of said parcels having been first offered in separate tracts or lots without receiving bid or bids therefor or any part thereof, and the purchaser will be entitled to a Deed for the premises so sold on the 24th day of August, 1886, unless the same shall be redeemed as provided by law.

SETH F. HANCHETT,
Sheriff.

Recorded May 22nd, 1885.

305 The decree proceeds: Which said lots and premises were sold on the 23d day of May, 1885, to George F. Harding, for the sum of $500, and a deed issued by the sheriff to him on the expiration of the redemption of said sale.

That on the 24th day of September, 1889, a judgment was rendered by the Superior Court of Cook County against Charles W. Colehour and William H. Colehour in favor of Crane Brothers Manufacturing Company for $3,591, which execution was issued and levied on the following described lots and premises, to wit:

Crane Bros. Mfg. Co. *vs.* C. W. and Wm. H. Colehour. Judgment, Sept. 24, 1879.

Date of sale under above judgment, Sept. 14, 1886.

Sold to Edward Roby. Amount of sale $5,129.52.

306 (Then follows the list of premises described in the original bill of Charles W. Colehour, printed ante, pp. 16–18.)

This list covers two pages of the decree. The decree

307 proceeds:

All of which were sold to Edward Roby on the 14th day of September, 1886, and sheriff 's deeds were subsequently executed and delivered to the said Roby and George F. Harding respectively, purporting to convey said premises.

That the said Edward Roby, from the time of the making of the arrangement and contract, in the declaration of trust mentioned between him and the said Charles W. Colehour and William H. Colehour, in October, 1873, acted as attorney, solicitor and counsel for the said Colehours with reference to said property and joint adventure in which they were engaged, until after the making of the said deed and instrument of assignment in writing to the said Edward Roby, by the said William H. Colehour and his wife, in January, 1887, and that the relation of attorney and client existed between them during said period of time.

That said Edward Roby procured a Deed of Conveyance from the said Landis, and another Deed from the said Harding for the premises sold as hereinbefore stated, under judgment and execution; and that the said Edward Roby holds such title as he acquired by virtue of said Deeds, as well as by the Deed of the Sheriff as hereinbefore mentioned, executed to him, except Lots 18 and 19 in Block 16, and Lots 15, 16 and 17 in Block 33, as Trustee for himself and said Charles W. Colehour and William H. Colehour, in proportion to their respective interests as established by the Declaration of Trust made as aforesaid, in October, 1873.

That the said Edward Roby obtained the Deed as well as the instrument of assignment in writing hereinbefore set forth, both dated January 6, 1887, from William H.

Colehour and wife; and which were acknowledged January 12th of the same year, without any consideration, or for a grossly inadequate consideration, and by the exer-
308 cise of undue influence over said William H. Colehour, and under such circumstances as renders them inequitable and unjust as against the said William H. Colehour and his wife; and that the said Edward Roby had at that time notice of the conveyance made by the said William H. Colehour to Charles W. Colehour, dated May 1, 1879, and that he acquired by such Deed or Instrument of Assignment no right in equity as against the said William H. Colehour or the said Charles W. Colehour; and such Deed and Assignment are hereby declared null and void.

That on the 24th day of October, 1881, a Bill in Equity was filed in the Circuit Court of Cook County by the said Robert D. Clarke and others, against the said William H. Colehour and others holding under him, together with the said Charles W. Colehour and Edward Roby to foreclose the mortgage for the purchase money remaining unpaid, and that such proceedings were had in said cause, that a Decree of foreclosure was rendered on the 17th day of July, 1886, requiring the payment of the amount thus found to be due, and in default thereof, ordering a sale of the premises remaining subject to said mortgage.

The said decree has since been affirmed on appeal in the Appellate Court and Supreme Court; and under and by virtue of the directions of the same the premises described therein were sold on the 30th day of December, 1889, and on the 29th day of January, 1890, to Charles E. Speer, and others; and that said premises were sold in separate lots and parcels, a description of which, together with the amounts for which the same were sold are shown by Exhibit A attached to the original bill herein, and are hereinafter described and set forth as follows, to wit:

309 Here follows the table showing the list of the lots and parcels sold, and the amount for which each parcel was sold. Among the parcels so listed are the following:

310	Lot	34	Block	30,	sold	for	$	200
313	"	17	"	34,	"	"		200
312	"	9	"	30,	"	"		100
	"	10	"	30,	"	"		100
	"	11	"	30,	"	"		100
313	"	35	"	28,	"	"		200
	"	17	"	30,	"	"		100
	"	16	"	"	"	"		200
	"	35	"	"	"	"		100
	"	36	"	"	"	"		100
	"	37	"	"	"	"		100
	"	38	"	"	"	"		100
	"	39	"	"	"	"		100
	"	40	"	"	"	"		100
	"	41	"	"	"	"		100
	"	42	"	"	"	"		100
	"	43	"	"	"	"		100
	"	44	"	"	"	"		100
312	"	45	"	"	"	"		200
	"	46	"	"	"	"		200
313	"	14	"	"	"	"		200
	"	15	"	"	"	"		200
	"	17	"	26,	"	"		75
312	"	20	"	30,	"	"		200
313	"	21	"	"	"	"		50
	"	22	"	"	"	"		50
	"	16	"	12,	"	"		200
312	"	33	"	17,	"	"		75
	"	17	"	33,	"	"		100
	"	15	"	"	"	"		100
	"	16	"	"	"	"		100
313	"	10	"	11,	"	"		200
	"	21	"	10,	"	"		200
								$4,350

313 After the said list of lots and parcels and the prices at which they were sold by the Master, the Decree proceeds:

" *The following are the lots and lands which at the date of entering of this Decree belong to the Trust Estate created under the Declaration of Trust hereinabove set forth.*"

310	Lot	34	Block	30,	sold	for	$	200
313	"	17	"	34,	"	"		200
312	"	9	"	30,	"	"		100
	"	10	"	30,	"	"		100
	"	11	"	30,	"	"		100
313	"	35	"	28,	"	"		200
	"	17	"	30,	"	"		100
	"	16	"	"	"	"		200
	"	35	"	"	"	"		100
	"	36	"	"	"	"		100
	"	37	"	"	"	"		100
	"	38	"	"	"	"		100
	"	39	"	"	"	"		100
	"	40	"	"	"	"		100
	"	41	"	"	"	"		100
	"	42	"	"	"	"		100
	"	43	"	"	"	"		100
	"	44	"	"	"	"		100
312	"	45	"	"	"	"		200
	"	46	"	"	"	"		200
313	"	14	"	"	"	"		200
	"	15	"	"	"	"		200
	"	17	"	26,	"	"		75
312	"	20	"	30,	"	"		200
313	"	21	"	"	"	"		50
	"	22	"	"	"	"		50
	"	16	"	12,	"	"		200
312	"	33	"	17,	"	"		75
	"	17	"	33,	"	"		100
	"	15	"	"	"	"		100
	"	16	"	"	"	"		100
313	"	10	"	11,	"	"		200
	"	21	"	10,	"	"		200
								$4,350

313 After the said list of lots and parcels and the prices at which they were sold by the Master, the Decree proceeds:

"*The following are the lots and lands which at the date of entering of this Decree belong to the Trust Estate created under the Declaration of Trust hereinabove set forth.*"

This list extends to the middle of page 317. It does not contain any of the lands embraced in the Silicon tract, (the 26 2/3 acres conveyed to Egbert Gulick), as above mentioned, and it does not contain any of the lots described in the list following on pages 317 and 318 and mentioned in the following order; with which the Decree proceeds:

317 "That the following lots and lands have been heretofore sold by William H. Colehour to bona fide purchasers, and that these lots have also been sold by the Master in the Clarke foreclosure sale, and that it is the duty of the Receiver in this case to pay the said amount for which such lots were sold by said Master, together with interest accrued thereon, and have the same canceled of record.

Upon payment to the Receiver of any sum of money due on said lots and yet unpaid, together with interest thereon, as well as all taxes and assessments on such lots, with interest thereon, the Receiver shall convey the same to the purchasers entitled thereto. The lots and lands described below belong to purchasers for value from William H. Colehour, and are still subject to the amounts for which sold by the Master in the case of Clarke et al. vs. Colehour et al.

Lot 34, Block 30.
Lot 33, Block 27.
Lots 15, 16 and 17, Block 34.
Lots 9, 10, 11, Block 30.
Lot 17, Block 34.
318 Lot 35, Block 28.
Lot 17, Block 30.
Lot 16, Block 30.
Lots 35 to 46, Block 30.
Lots 14 and 15, Block 30.
Lot 17, Block 26.
Lots 22, 21 and 20, Block 30.
Lot 16, Block 12.
Lots 33 and 34, Block 17.
Lot 17, Block 33.
Lots 15, 16 and 17, Block 33.
Lots 18, 19, Block 10.
Lot 10, Block 11.
Lot 21, Block 10.
Lot 47, Block 13.

These lots are not mentioned either in the Bill of Charles W. Colehour or William H. Colehour, or in any of the Answers in this case, except as Charles W. Colehour attaches a list of the land sold by the Master to his Bill. They are not in the list which just precedes this in which the Decree finds what lots are under the Trust that it ascertains.

The amount for which these lots were sold appears above to be $4,350, for the list of the lots extracted above from the list of lands sold by the Master, is this same list of lands. And the decree finds that they were sold for $4,350, and requires that the receiver shall redeem them from the amount of that sale.

318 The decree further proceeds: The court further finds that no title was conveyed by the deed of George F. Harding of Lots 9, 10 and 11, in Block 30, of Ironworker's Addition to South Chicago, which deed was procured by the said Edward Roby as a part of the consideration for the deeds by William H. Colehour to him in the month of January, 1887; but that the title to said lots had been conveyed to George W. Snyder by the deed of William H. Colehour, dated on the 22d day of August, 1877; and recorded on the 9th day of November, 1878, in Book 856 of Records, page 1; and he conveyed the same to Carrie M. Colehour by a deed dated the 16th day of November, 1888.

That no title was conveyed by the deed executed and delivered by the said Edward Roby to Carrie Stirmel Colehour to Lots 1, 2, 3, 4, 5, 6, 7, 8, 9 and 10, in Block 36, of said Ironworker's Addition, or of Lot 8, in Block 30, of said Ironworker's Addition; said property belonging to the present estate, hereinbefore mentioned; and that Lot 27, in the subdivision of Lot 1, in Block 7, of said Ironworker's Addition, conveyed by D. M. Hillis to Lucy Lender, and by Lucy Lender to the said Carrie Stirmel Colehour, procured by the said Edward Roby,

319 belonged to the trust estate, vested in David M. Hillis as trustee; and that said Hillis charged said Roby $400 as paid to him out of said trust fund on conveyance of said lot to said Lucy Lender; and that the said William H. Colehour should account for the money he received on the sale of said lot, or its value, in the accounting hereafter to be

had; and that whatever title said Roby had so acquired he holds in trust for the benefit of said Colehours and himself.

That Richard D. Lender on the 26th day of November, 1886, who then held the title to the following described lots and lands, situate in Cook County, Illinois, and being part of said trust estate, to wit": (the lots set forth above in the amendment to bill of complaint of Charles W. Colehour, page 45, ante).

320 "In trust for the said Charles W. and William H. Colehour and Edward Roby, made, executed, acknowledged and delivered to Edward Roby a deed of the same. That said Roby at the time he received said deed knew that the said land last described was so held in trust by said Lender; and that said Roby now holds the title to the same in trust for himself and said Colehours.

That the only judgments under which sales were made of any of the trust property in this case at issue were the *McCoy* for the use of Frank W. Harding vs. *C. W. Colehour; Oliver H. Horton*, Receiver of German Savings Bank vs. *Charles W. and William H. Colehour;* and the *Crane Brothers Manufacturing Company* vs. *Charles W. and William H. Colehour*. And that all the land and lots sold under any and all such judgments passed to said Edward Roby; and the titles were in said Roby at the filing of the Bill in this case.

That said Roby holds said judgment titles as trustee for himself, Charles W. and William H. Colehour.

That the Deed of May 1st, 1879, of William H. to Charles W. Colehour and acknowledged by William H., on May 1st, 1879, recorded in Book 2,389, page 365, in and by which all of the property therein described was conveyed to Charles W. Colehour to hold under Declaration of Trust, and which Deed is set out hereinabove in full is binding and in full force between the parties hereto, and makes Charles W. Colehour, the trustee of all the trust property involved in this suit in the place and stead of William H. Colehour.

321 That Charles W. Colehour is the owner of and is entitled to the one-half, William H. Colehour, to the one-

quarter, and Edward Roby, to the one-quarter interest, according to the terms as set forth in said Declaration of Trust of all said trust estate.

That the land known as the Silicon land, hereinabove described, was recovered from Egbert Gulick, President of said Company, by the joint co-operation, money and labor of the said Colehours and said Roby. But the Court makes no finding in regard to the ownership of said land in this Decree.

That the land deeded by William H. Colehour to Jared Myers Clarke, July 2nd, 1877, and which is fully described hereinabove, belongs to the trust estate, created under said Declaration of Trust.

That subsequently and on or about July 2nd, 1877, the said Jared Myers Clarke did execute a Deed conveying said premises above described to William H. Colehour.

And that subsequently thereto the said Deed, last named, was changed by erasing the name of William H. Colehour, and inserting the name of Anna P. Colehour as grantee therein.

And at or about the same date the said Clarke did execute an instrument of writing, purporting to be a deed (but to which there was no seal), conveying said last described premises to Mabelle Colehour, then an infant of about ten years of age—and acknowledged the same in due form. And the said Mabelle, after her majority, did execute a deed of the same premises to Charles W. Colehour. And that said Charles W. Colehour holds whatever interest he acquired by said deed in trust for himself, said Roby and William H. Colehour.

That the land deeded by William H. Colehour to Jacob Bremer belongs to the trust estate, created under said Declaration of Trust.

That the land deeded to Richard D. Lender by William H. Colehour and fully set out hereinabove, belongs to the
322 trust estate, as created under said Declaration of Trust.

That any lots or lands shown to be held in trust for the trust estate, and which lots and lands are now mortgaged to secure any indebtedness, excepting the Clarke indebtedness, as shown by the master's certificates, are all ordered by this court to be deeded by the parties to this suit, where such parties hold or control the titles thereto, to the receiver in this decree named.

And the court reserves the right to make such further order and decree in reference to the proceeds of all such lands and lots upon the hearing of the final account between the parties to this suit.

That the land mentioned in the said deed of May 1st, 1879, from William H. to Charles W. Colehour, and described as follows, to wit: The West half of the North West quarter of Section 17, Township 37, North, Range 15, East of 3d Principal Meridian is not considered in this decree; and no findings are made by the court concerning the same.

That Edward Roby filed his petition in bankruptcy in the United States District Court on August 31st, 1878, and was duly discharged on the 23d day of November, 1880; that he purchased from Bradford Hancock (said Roby's assignee in bankruptcy) at a sale on the 21st day of January, A. D. 1882, the following: "The interest derived by Declaration of Trust in all the North three-fourths of East fractional half of Section 17; also South half of Section 8 and part of the North half of Section 8, lying east of a line drawn from the intersection of the North line of said South half, and Lake Shore & Michigan Southern Railroad, at right angles to the line of said railroad, to Lake Michigan—excepting said Michigan
323 Southern and the Pittsburgh, Ft. Wayne and Chicago Railroad lands—in Township 37, North of Range 15, East of the third Principal Meridian, for the sum of $4. All of the foregoing property is situated in the County of Cook and State of Illinois."

Which interest was described in "Schedule B" to the petition in Bankruptcy of said Roby, as follows:

"In the matter of Edward Roby, Bankrupt.

Property in reversion remainder or expectancy, including property held in trust for him or subject to any power or right to dispose of or to charge.

The interest derived by Declaration of Trust in 406 acres of land in Sections 8 and 17, T. 37, R. 15, Cook County, Illinois, executed by William H. Colehour to William Hansbrough, July 31st, 1871, which interest was assigned to Charles W. Colehour and Edward Roby in consideration of $19,066.47 October 18, 1873. Said Declaration of Trust is in the following words:

"Chicago, Ill., July 31st, 1871.

Know all men by these presents, that the 406 acres this day bought of H. F. Clarke, by me, in my name, is one-half the property of William Hansbrough; he having bought the one-half, and paid the one-half of the cash payment, to wit: $5,000. And as the same is sold he to have one-half of the profits.

WILLIAM H. COLEHOUR.

Said interest is further established to be one-fourth the net profits, and all the advances made by me on account of said land, by Declaration of said William H. Colehour given subsequently to the above assignment.

Said land is particularly described in a Deed from Henry F. Clarke, Robert D., Harriet S. and Sarah J. Clarke to said William H. Colehour dated July 18, 1871, and recorded in Cook County, Illinois, and embraces all the north three-quarters of E. fractional ½ of sec. 17; also all
324 S. ½ Sec. 8, and part of N. ½ Sec. 8, lying East of a line drawn from the intersection of the North line of said S. ½ with the Lake Shore & M. S. R. R., at right angles to the line of said R. R. to Lake Michigan, excepting said M. S. and the P., Ft. W. and C. Railroad lands.

Said lands have in part been subdivided by the name of Ironworkers Addition to South Chicago; and sales have been made therein by said William H. and Charles W Colehour, as appears from the Records, to an amount exceeding $233,000; most of the proceeds of which have been received by Charles W. Colehour. And the interest of your petitioner in said proceeds, and in the lands remaining, which amount to about 240 acres or 2,400 lots, your petitioner believes to be over $153,000.

EDWARD ROBY,
Petitioner."

That Charles W. Colehour holds certain Deeds to parts of said land, which have not been recorded, and which are necesary to perfect the title to the lands covered by them; and holds the title to portions of the same. And the Court finds that the titles to any portions of said land held or controlled by said Charles W. Colehour are held in trust for himself, said Roby and William H. Colehour.

That the said land is subject to tax liens, and the certificates of sale issued by said master.

That the differences between said Colehours and said Roby are such that they can only be determined and settled in a court of equity.

That said land is now worth, above said liens, not less than $200,000. And that in order to preserve said property and prevent the interest of said parties therein being cut off, for want of ability to redeem the same from said liens, it is necessary that a receiver be appointed; with
325 power to sell sufficient of said lots and land to pay and discharge said liens, and the debts against said lands.

And that in order to enable him so to do the said Roby and the said Colehour should, as soon as possible, by good and sufficient deeds convey to such receiver the title and interest of all and each of them in said lands.

That certain moneys have been paid by said Roby and said Colehour, in the furtherance of said joint adventure, concerning the merits of which this court cannot on the evidence now before it decide. And that an accounting will therefore be had, for the purpose of determining how much, if anything, may be due to either of said parties: and the court leaves for further consideration all questions relating to said accounting.

The alleged verbal settlement of 1879 is not sustained by the evidence, and will be disregarded as a settlement.

The court finds that said Roby was not guilty of any actual or intentional fraud.

And that the gross charges of fraud, among which are the charges as to his having stolen the declaration of trust from its place of deposit; that the deed of William H. Colehour to him was a forgery; and that he offered to betray his client Clarke in 1873; are not proven by the evidence in the case.

This court therefore hereby orders, adjudges and decrees that the *Title Guarantee and Trust Company* be and is hereby appointed to be a *receiver* of said property; that said Edward Roby within ten days from its qualification as such, by a good and sufficient deed, convey to said receiver all the titles to said lots and lands which have, as before found, been deeded to him, and also all of his right, title and interest in and to the lands and lots hereinbefore
326 described as belonging to said trust estate; that said Charles W. Colehour, within ten days from this date, by

good and sufficient deed or deeds, convey to said receiver the said titles he has acquired; and file for record all the deeds he has under his control, affecting the title to any part of said land; and also, within that time, deed to said receiver all his right, title and interest in said lots and land included in said trust estate; and that William H. Colehour within that said time also, by good and sufficient deed, convey all his right, title and interest in said land included in said trust estate to said receiver.

And the court further orders and decrees, that said Receiver, before he enters upon the discharge of his duties, make, execute and deliver to this court, a bond with good and sufficient securities, in the penal sum of $100,000, conditioned for the faithful performance of his duties as such Receiver.

The court further orders and decrees, that said Roby and the said Colehours, each of them, immediately deliver to said Receiver all abstracts of title of said lands or any part thereof, in the possession or control of either of them, and that they and each of them, in all reasonable ways aid said Receiver in perfecting the title to said lands, and getting the same ready for market.

The court further orders and decrees that in case said Roby, or either of said Colehours, shall fail, within ten days from the date of the approval of the bond and qualification of such Receiver, to make, execute and deliver the deeds heretofore ordered to be made and delivered to said Receiver, then George Bass, Master of this Court, shall make, execute and deliver to said Receiver good and sufficient deed or deeds, conveying the title and interest of the one or more refusing or neglecting to make such deed
327 in said Receiver.

The Court further orders and decrees that said Receiver with all convenient speed proceed to properly advertise said lands and lots for sale, either at a public auction or private sale, and to sell sufficient of the same to pay and discharge said debts and liens, and if necessary so to do in order to perfect the title to said lots and lands, pay and discharge a certain judgment of about fifteen hundred ($1,500) rendered against Charles W. Colehour and others in favor of Loviza Thunman.

Said Receiver shall have full power to make all necessary deeds and conveyances.

He may sell for all cash or part cash and balance on time, with secured notes, on such time as may be customary on the real estate market.

He shall report the sales he may make to this Court for its approval; and give at least one day's notice of the application for approval to the said Roby and Colehours, by leaving notice in the office of said Roby and the office of the solicitor of said Colehours.

It is further ordered, that this cause be referred to George Bass, Esq., a Master in Chancery in this Court to take the account of said trusts from the commencement thereof. That said William H. Colehour and Charles W. Colehour and Edward Roby forthwith produce and deposit with said Master all books, accounts and memoranda touching the subject-matter of the said trusts, all receipts and vouchers for money or other property of the trusts disposed of by them or either of them, and all documents and memoranda in their possession or power relating to the execution of their trusts.

It is also further ordered that the Receiver report his proceedings in the premises to this Court, with all convenient speed.

The Court reserves the right to make any further order
328 herein concerning the accounting between the parties hereto, and further directs the Master to act with reference to said accounting with all convenient speed; and to take the testimony therein and report the same to the Court, together with his findings thereon.

The said bills in the cases of

Roby vs. James E. Clarke and C. W. Colehour.
Roby vs. Jared M. Clarke and C. W. Colehour.
Roby vs. Charles W. Colehour.

All and each of them is dismissed for want of equity.

The question as to costs is reserved for future decision.

Thereupon the said defendant, Edward Roby, prays an appeal to the Supreme Court of the State of Illinois, which appeal is allowed upon the defendant Edward Roby filing a bond within twenty days in the penal sum of $200,000, with security to be approved by the Court. And said bond shall contain the condition, that the appellant shall prosecute his appeal with effect; and in case the said decree is affirmed shall pay all costs of this Court,

and abide by and perform such order and judgment as may be entered by the Supreme Court on such appeal, and comply with any order entered in pursuance of the mandate of said Supreme Court; and shall further pay all damages which may be suffered by the said Charles W. Colehour and William H. Colehour, or either of them by reason of such appeal. And in ascertaining such damages the difference between the amount required to redeem the lands and lots hereinbefore described in this decree, and the amount which might be realized by a sale of said lands and lots respectively by the Receiver appointed by this Decree, shall be the rule for ascertaining such damages.

And sixty days from date is granted said Roby in which to prepare and file a Certificate of Evidence herein.

329 Certificate of the Clerk under the seal of the Court that the foregoing is a true, perfect and complete copy of a certain Decree made and entered of record on the 12th day of June, 1889.

330 MOTION TO INCREASE APPEAL BOND, June 14, 1890.

This day comes the complainant by his solicitor and *moves the Court to increase the penalty* in the appeal bond herein, which motion is continued to the next term of this Court.

ORDER.

June 16, 1890.

ORDERED, that the motion of the Complainant to increase the penalty of the appeal bond be continued until to-morrow morning at 10 o'clock.

331 ORDER.

June 17, 1890.

ORDERED, that the motion to increase the penalty of appeal bond is continued to Thursday morning next.

ORDER.

June 19, 1890.

Increasing Appeal Bond, Refusing to increase Receiver's Bond.

332 This cause coming on again upon the motion of the complainant in the original bill, and the complainant in the Cross-Bill to increase the amount of the penalty in the appeal bond as fixed by the Decree heretofore entered; and the Court having heard the affidavits read as to the value of the land in controversy, and the probable damages which may be caused by the appeal, and the suggestions of counsel, and being sufficiently advised,

IT IS ORDERED, that the motion be sustained, and that the penalty in the appeal bond be increased to three hundred thousand dollars ($300,000), and that the said Decree be so amended. To all which the Defendant Roby excepts, and files his Bill of Exceptions.

And the motion of the Defendant Roby to increase the amount of the Receiver's Bond is, after hearing counsel for the respective parties, overruled.

After which and on June 19th, a Bill of Exceptions was filed in said cause in the words and figures following, to wit:

333 BILL OF EXCEPTIONS.

On motion to increase bonds.

Entitled in all of the causes.

Filed June 19, 1890.

Now, on this 19th day of June, 1890, come Charles W. Colehour and William H. Colehour, by their Counsel, and their motion entered on the 16th day of June to increase the amount of appeal bond, coming on to be heard upon the affidavits by them filed in this Court, in the first above entitled case, on the 18th day of June, instant, which are in the words and figures following, to wit:

(Before reciting the affidavits the other motion made thereon is inserted.)

356 And on the same affidavits said Roby moves the Court to increase the bond of the Receiver to an amount sufficient to protect the fund by said affidavits shown to be by the Decree entrusted to him, but the Court denies the motion and said Roby then and there duly excepts.

(We now return to page 334 to said affidavits.)

334 CHARLES W. COLEHOUR, being duly sworn, says, that he is complainant and entitled to one half the net profits of the land mentioned in said Bill. That there is a demand for property now in lots, as well as by the acre; that houses are now required for the laborers at the new Ship Yards and new Steel Works and Smelting Works, to the number of at least one thousand; and about one thousand lots could be sold by the Receiver upon which to build said houses if the lands were now offered for sale; but that such demand for lots will be satisfied elsewhere and away from this property if it cannot be sold now, and this opportunity will be lost; that if one thousand
335 lots could be offered from the land in question now by the Receiver, each of said lots would produce not less than $600 or a total of $600,000; and leave unsold by said trust estate 200 acres, which would sell in the market at not less than $2,500 per acre, amounting to $500,000, or a total of $1,100,000.

He further says that he has now from parties living near the land in question offers for upwards of 100 lots at prices ranging for corner lots as high as $1,200 each, and inside lots not less than $600 each; that $1,500 has been paid within three weeks for a single lot on a corner within one block of this trust property, said lot being being 25 x 125 feet in dimensions.

Affiant says that on the 22d of September, 1890, the
336 land in question will be forfeited for taxes, and a tax deed issued, and that the amount to redeem from the same exceeds $5,000.

Said Roby has declared to this affiant within the past five days that he would keep this litigation pending in Court by appeal until he had wrecked the whole of affiant's and his brother's interest.

Signed Charles W. Colehour. Sworn to June, 18, 1890.

337 JOEL D. HARVEY, being sworn, says, he is engaged in real estate business and is familiar with the values of real estate in Sections 8 and 17, described in the Bill in the above suit. And that the values of said lands have increased in the past two or three months twenty-five per cent., and are now increasing rapidly. That the land in

1843 EXHIBIT E.

Sheriff to Roland R. Landis.

Dated November 1, 1883.

Recorded June 6th, 1884, in book 1491, page 195.

Recites recovery of judgment by Horton, Receiver, at September Term, 1878, of Superior Court vs. William H. Colehour and Charles W. Colehour for $4,113.58 and costs. Upon which judgment an alias execution issued:

Dated July 3d, 1882, by virtue of which the Sheriff levied on the premises hereinafter described, and having given due notice according to law the same were struck off and sold to Roland R. Landis, July 31st, 1882.

1844 Conveys the N. ¾ E. fractional ½ Sec. 17; also 144
1845 lots described in S. half Sec. 8 (Ironworkers' Addition).

Dated November 1, 1883.

Signed by the Sheriff and acknowledged and recorded as above stated.

1846 EXHIBIT F.

Quitclaim deed in old form with covenants against acts of grantor.

Roland R. Landis to Edward Roby.

Dated March 26, 1884.

Consideration, $600.

Conveys the same land conveyed by the Sheriff to Landis, by Exhibit E, ante.

1849 Acknowledged March 27, 1884.

1850 EXHIBIT G.

Sheriff's deed to George F. Harding.

Dated October 13, 1886.

Recites judgment of Charles B. McCoy at June term, 1878, of Superior Court against William H. Colehour for $3,700 and costs, issue of pluries execution dated April 24, 1885; levy on land described, and sale thereof, to George F. Harding on May 23, 1885, therefore conveys 18 lots by their numbers, also all of Blocks 9 and 46. Including in those enumerated Lots 9, 10 and 11, Block 30.

(Which were the lots Roby caused Harding to deed to the wife of William H. Colehour in part consideration for Exhibits 8 and 9 post, p. 1998-2000.)

1852 Acknowledged October 13, 1886.
Recorded October 21, 1886, in book 1,960, page 507.

1853 EXHIBIT H.

Sheriff 's Deed to George F. Harding.

Recites judgment in favor of Charles B. McCoy at June term, 1878, of Superior court against Charles W. Colehour for $3,700 and costs; issue of pluries execution April 27, 1885, and levy thereof upon the land below described and sale to George F. Harding on May 23, 1885, and con-
1854 veys N. ¾, E. ½, Sec. 17; W. ½, N. W. ¼, Sec. 17, S. ½ Sec. 8, except certain lots in Ironworkers' Addition therein mentioned. Also that part of north half of section 8, lying east of line drawn, etc., so as to embrace all of the land bought of the Clarks originally.

1855 Acknowledged October 21, 1886, and recorded October 21, in book 2006 of Record, page 127.

1856 EXHIBIT I.

Statutory form quitclaim deed.

George F. Harding and wife to Edward Roby.

Dated, February 18, 1878.

Consideration $4,721.00.

Conveyed N. ¾, E. ½, Sec. 17; W. ½, N. W. ¼, Sec. 17; S. ½ Sec. 8; that part of N. ¼ of said Sec. 8, E. of the line between the Taylor and Colehour land, describing it.

1857 Dated February 8, 1888.

1858 Acknowledged February 9, 1888.
Recorded February 16, 1888, Book 2139, page 220.

1859 EXHIBIT J.

Sheriff's deed.

Sheriff to Edward Roby.

Dated December 16, 1887.

Recites judgment of Crane Bros.' Mfg. Co. at September term, 1879, of Superior Court against Charles W. Colehour and William H. Colehour for $3,591 and costs: issue of alias execution August 14, 1886: levy thereof, ad-
1860 vertisement and sale to Edward Roby (on September 14, 1886), and therefore conveys the lots and parcels hereinafter described, describing 438 lots by their numbers, also two blocks by their numbers, which comprise 96 lots:
1865 making in all 534 lots conveyed by this Sheriff's deed.

Dated December 16, 1887, acknowledged on the same day.

1866 Recorded February 1, 1888.

The description in this deed included lot 8, in Block 30 of Ironworkers' Addition, which is the Lot Roby contracted by Exhibit 10, page 2002 post, to convey to the wife of Wm. H. Colehour, and did so convey.

EXHIBIT F (2d).

Roby's request to bring in papers.

Not addressed to any one and not signed.

"Please bring in the following Exhibits:

Colehour Exhibit 16: short paper, dated Sept. 22, 1876. Signed C. W. Colehour. Releasing, etc., to W. H. C. everything. Consideration $20,000."

1867 EXHIBIT G (2nd).

Promissory note: C. W. Colehour to E. Roby, Mch. 21, 1874, for $5,000 at 60 da.

"$5,000.00 CHICAGO, March 18, 1874.

Sixty days after date I promise to pay to the order of Edward Roby Five Thousand Dollars, with interest at the rate of ten per cent. per annum, at the National Park Bank, in the City of New York. Value received.

(Signed): C. W. COLEHOUR.

(Endorsed): Edward Roby."

EXHIBIT H. (2nd).

Promissory Note: C. W. Colehour to E. Roby, May 25, 1874, for $5,000 at 60 da.

"$5,000.00 CHICAGO, ILLINOIS, May 25, 1874.

Sixty days after date I promise to pay to the order of Edward Roby Five Thousand Dollars at the National Park Bank, in the City of New York. Value received.

(Signed): C. W. COLEHOUR.

(Endorsed): Edward Roby."

1868 EXHIBIT I (2nd).

Discharge in Bankruptcy of C. W. Colehour, May 5, 1883. In usual form.

1870 EXHIBIT J. (2d.)

Receipt of W. C. Goudy to W. H. Colehour Nov. 17, 1881, for $250, retainer in Clark v. Colehour.

OFFICE OF GOUDY & CHANDLER, 162 WASHINGTON ST.

W. C. GOUDY,
GEO. CHANDLER. CHICAGO, Nov. 7, 1881.

$250. Received of Charles W. Colehour by Jacob Bremer two hundred and fifty dollars retainer in foreclosure case of Clark vs. Colehour, with the understanding that fees for services are hereafter to be satisfactorily increased when Mr. Colehour returns.

W. C. GOUDY.

EXHIBIT K.

Copy of letter. W. H. Colehour to Wm. Hansbrough, Aug. 12, 1873.

Wm. Hansbrough, E., L. D. Boone, E.

GENTLEMEN: I hereby desire to notify you that in the purchase of the 409 acres of land from Henry F. Clarke, Robert D. Clarke & wife, Sarah J. Clarke and Harriet S.
1871 Clarke, of date July 18th, 1871, being the S. ½ of Sec. 8, & the E. ½ of Sec. 17, in T. 37, N., R. 15, E., Cook

if the Clark suits proceed he shall let Will keep out of the way, send him to Florida for his health, perhaps, and
2086 avoid service of process.

The envelope bears date New York Post Office stamp of September 30, and is addressed to E. Roby, Chicago.

EXHIBIT 58.

Statutory form of Warranty Deed.

William H. Colehour to Edward T. Doyle.

Dated January 15, 1877.

Consideration $4,500.

Conveys Lots 35 to 44, inclusive, in Block 30, Iron-
2088 worker's Addition.

Acknowledged January 15, 1877.

2089 Recorded January 16, 1877.

2090 EXHIBIT 59.

Certified copy of papers and proceedings in the matter of the bankruptcy of Charles W. Colehour.

Petition in the usual form of petition in bankruptcy.

2091 Oath of Charles W. Colehour, to the petition.

Sworn to August 27, 1878.

2092 Schedule of Indebtedness.

These schedules of indebtedness cover ten pages, and show an aggregate of debt of upwards of $819,000.

The schedules of unsecured indebtedness are on pages 2096–2100, and are as follows:

SCHEDULE A—3.—(As Approved.) Sec. 5015 U. S. R. S.—Form No. 408.

SCHEDULE A—3.

In the Matter of CHARLES W. COLEHOUR, Bankrupt.

CREDITORS WHOSE CLAIMS ARE UNSECURED.

N. B.—When the name and Residence (or either) of any Maker, Endorser or Holder of any Bill or Note, etc., are unknown, the fact must be stated, and also the Name, Residence and Occupation of the last holder known to the Petitioner. The debt due to each Creditor must be stated in full, and any claim by way of Set-off stated in the Schedule of Property. The nature of each Debt and Demand, whether founded on Written Security, Obligation, Contract, or otherwise, and also the true cause and consideration of such Indebtedness in each case, and the place where such Indebtedness accrued.

Names of Creditors.	Residences and Occupations.		Amount. Dollars.	Cts.	When and Where Contracted.		Nature and consideration of the Debt and whether any Judgment, Bond, Bill of Exchange, Promissory Note, etc., and whether contracted as Co-Partner or Joint Contractor with any other person, and if so, with whom?	
Dobson & Rasher..	Chicago.	Surveyors	22		1876	Chicago	Account.	Surveying.
Beardsley, Newton & Co.....	"	Livery	61		1875	"	"	Horse hire.
Kantzler & Hargis.	"	Merchants	250		1877	"	Note.	Money borrowed.
Universal Life Insurance Co.....	"	about	600		1874	"	Judgment.....	
Goudy & Chandler	"	Attorneys	1,101	50	1876-7	"	Account.	Legal services
John Borden.....	"	"	1,500		1875-6	"	"	"
Williams & Thompson	"	" about	1,200		1874-5	"	"	"
Leffingwell & Johnson	"	"	2,000		1876-7	"	"	"
Chas. J. Johnson....	"	" about	300		1877-8	"	"	"
J. D. Harvey.....	"	Broker	200		1875	"	"	Rent
Ely & Burnham.....	"	Reporters	161	50	1875	"	Note.	Reporting
Tillotson Bros	"	Hardware	142	50	1876	"	Account.	Pumps
Barker & Waite.....	"	Attorneys, about	2,000		1873-4-5-6	"	Notes.	Legal services
F. M. Grey or Gray	"	Speculator	1,791	39	1874	"		Judgment
J. Heaney.....	"	Furniture	350		1875	"	Account.	Furniture
E. Blatchford & Co.	Chicago.	Paints & Oils	705		1876	"	Note.	Paints
Wm. H. Richardson	"	Attorney	250		1875	"	Account.	Attorney's fees
Bullock Bros.....	"	Boots & Shoes	60		1875	"	Account.	Shoes
R. Ludlam.....	"	Physician	63		1875	"	"	Medical services
Whitehead & Co....	"	Livery	15		1875	"	Account.	Carriage hire
E. M. Ludlam.....	"	Physician	30		1876	"	"	Medical services
Charles Reinhardt	St. Louis	Broker, about.....	5,000		1878	St. Louis	Judgment..	
Cooper, Roe & Pulver.....	New York.	Attorneys	75	50	1875	New York	Account.	Legal services
Pardee & Stanton..	Chicago.	Grocers	162	50	1876	Chicago	"	Groceries
J. M. Bailey.....	Chicago.	Attorney	1,500		1876-7	"	Account.	Legal services
Mrs. D. Tillinghast	"	Property owner	400		1874	"	Rents.	
Western Catholic...	"	Publisher	100		1878	"	"	Advertising
E. W. Russell.....	"	Attorney	500		1878	"	"	Legal services
J. W. Brockway.....	"	Recorder	100		1878	"	"	Abstracts
J. Wright.....	"	Livery	65		1875	"	"	Livery carriage hire
G. L. Hoodless.....	"	Broker	100		1877	"	"	Money borrowed
A. Rehm.....	"	Hardware	50		1877	"	"	" "

Fred. Sackett.....	"	Attorney	750	1875	"	"	Legal services
P. Cleaver.....	"	Grocer	164 18	1875	"	"	Groceries
C. H. Brennan.....	"	Printer	15	1878	"	"	Printing
L. B. Brown.....	"	Lime, Cement	75	1878	"	"	Cement.
T. H. Swan.....	"	Broker	500	1876	"	Note.	Money borrowed
L. C. Stannard.....	"	Clerk	150	1877	"	Account	Services as clerk. .....
Mrs. E.G. Stannard	"	Farmer	600	1876	"	Note.	Money borrowed
S. Freeman.....	"	Tailor	20	1877	"	Account.	Clothes
D. McDole.....	"	Coal	39	1877	"	"	Coal
C. Tatum.....	"	Grocer	20	1876	"	"	Groceries
P. H. Putnam.....	"	Clothier	35	1876	"	"	Clothing
P. L. Underwood & Co.....	"	Brokers	463	1875	"	"	Money borrowed
Kaufman & Collert.	"	Advertising	44 40	1877	"		Account Advertising
Cook, Pardee & Blanchard	"	Lumber	1,349 07	1874	"	Notes.	Lumber
J. Fisher & Sons....	"	"	150	1877	"	Account.	"
J. F. Tucker	"	Physician	48	1874	"	"	Medical Attendance
J. N. Crouse	"	Dentist	20	1876	"	"	Dentistry
E. Owens.....	"	Carpenter	100	1877	"	"	Carpentry
J. J. Hilty.....	"	"	125	1877	"	"	"
Jacob Bremer.....	"	Broker	350	1876-7-8	"	"	Money borrowed
A. L. Howard.....	"	Clerk	350	1877-8	"	Clerk.	Clerk service
W. H. Colehour.....	"	Real estate dealer	1,750	1877-8	"	Account.	Money borrowed
Hannah Colehour..	Chicago.		5,000	1868	Chicago	Note.	Money borrowed
C. G. Harris.....	"	Clerk	1,500	1875-6-7	"	Clerk.	Clerk service
Geo. A. Fitch.....	"		7,200	1875-6-7	"		Money borrowed
Kellogg & Johnson	"	Hardware	200	1877	"	Account.	Hardware
Charles Gossage....	"	Dry-goods about	350	Chicago	1876	Judgment.	
Mrs. Oren Clarke..	"	Widow	3,500	"	1867	Account.	Money borrowed
John J. Safely.....	"	Broker	1,000	"	1875	Note.	
Crane Brothers, Manufacturing Co	"	Elevator manufacturers	2,530	"	1875	By joint note of bankrupt and Wm. H. Colehour.	
Henry Clews & Co., Toppan, assignee, of.....	New York.	Bankers	14,645	New York	1875	Judgment.	
Estate of Wm. F. Coolbaugh.....	Chicago.	Bankers about	1,500	Chicago	1875	Judgment.	
Alvin Hurlbut	"	Hotel about	400	"	1874-5	Account for board, in dispute.	
Caroline Kleine.....	"	Widow about	600	"	1876	Note borrowed money.	
Laclede & Fort Scott Railroad Co	Missouri	Rail Road Company	400,000	Missouri	1872-3	Subscription to capital stock.	
Leffingwell & Johnson.....	Chicago.	Attorneys	600	Chicago	1875	Note.	Legal services
Kate M. Harris.....	"	Spinster	700	"	1874	"	money borrowed.
C. McLennan.....	"	Surveyor	220 40	"Sept.	1874		For surveying account.
E. Roby	"	Lawyer amount unknown.				Account for legal services, amount not known.	
Cappes & Eggers....	"	Contractor	400	At Chicago	1875	For work.	

CHARLES W. COLEHOUR.

2102 Oath of the Bankrupt to the foregoing ten pages of Schedules of Indebtedness, in the form required by the United States Statute.

2103 Then follow three pages of Inventory of personal property, the first page expressing wearing apparel $50 in value.

2104 Schedule claiming as exempt the wearing apparel.

2105 Schedule states that the deeds to all the property mentioned in Schedule A were burned in the fire of 1871.

None of those schedules mentioned the land in question in any form, or anything growing out of that land.

Each page of each schedule is signed at the foot of the page, *Charles W Colehour.*

2106 Oath of Charles W. Colehour that the last three named schedules are a statement of all his assets in accordance with the provisions of the Bankruptcy Statute—made in the usual form.

Endorsed: Filed August 30, 1878, at 5:20 P. M. William H. Bradley, Clerk.

2107 Petition for discharge by Charles W. Colehour, dated December 1st, 1880. Not sworn to.

2108 Filed December 6, 1880. William H. Bradley, Clerk.

Consent to the discharge by the Laclede &Fort Scott Railroad Company.

This is the same consent read in the testimony of Charles W. Colehour, *signed by him* with the name of the Company.

Acknowledged by Charles G. Harris April 2nd, 1880.

Filed in the Register's Office February 4, 1881. H. N. Hibbard, Register in Bankruptcy.

Filed April 17, 1883. William H. Bradley, Clerk.

2110 Another consent to the discharge of the bankrupt from the $400,000 claim of this railroad Company recited to have been proved up against his estate, signed by Charles G. Harris as President of that Railroad Company. The instrument, acknowledgment and oath being without date.

2111 Filed in my office March 26th, 1881. H. N. Hibbard, Register in Bankruptcy.

Filed April 17, 1883. William H. Bradley, Clerk.

Appearance in the matter of Charles W. Colehour, bankrupt, of Crane Brothers' Manufacturing Company,

a creditor *in opposition to the discharge* of said bankrupt-dated March 28, 1881. signed by *Edward Roby, its attor, ney.* Filed March 28, 1881.

WILLIAM H. BRADLEY, *Clerk.*

Like Appearance by Edward Roby, a creditor of said bankrupt.

(Signed): EDWARD ROBY, *pro se.*

Dated March 28, 1881. Filed the same day in the court.

Each of these appearances recite that they enter their appearance in opposition to the discharge of the bankrupt.

2113 Specifications of causes why Bankrupt should not be discharged.

Entitled in said court and matter, and alleged as reasons given by the Crane Brothers' Manufacturing Company and Edward Roby, creditors of the bankrupt, why the bankrupt should not be discharged. First, the bankrupt has not submitted himself, but is outside of the jurisdiction of the Court, in London, England. Second, the bankrupt has wilfully sworn falsely in his inventories as to material facts, Third, the bankrupt has concealed part of his estate, etc. Fourth, the bankrupt has made fraudulent transfers of his property, etc.

Signed (after adding other specifications),

EDWARD ROBY,

Attorney for said Creditors, respectively.

Endorsed: Filed April 7th, 1881.

WILLIAM H. BRADLEY, *Clerk.*

2115 Letter of attorney of creditor, The Crane Brothers Manufacturing Company to Edward Roby, *dated August 25, 1879*, authorized said Roby to proceed against above named debtor pursuant to the law; and to vote against compositions, and to manage and control the case, and settle and discharge the claims of the creditor.

Acknowledged August 25, 1879, before Notary Public, who certifies under his hand and notarial seal.

2116 *Subpœna.* Entitled in said court and cause, and commanding James E. Clarke to appear before Homer N.

Hibbard, Register in Bankruptcy of said court, on October 2nd, 1879, to testify on behalf of Edward Roby, one of the creditors, etc.

2117 Dated September 26, 1879, under the seal of said District Court.

Proof of Service on said James E. Clarke, at LaPaz, in Indiana, September 27, 1879, and payment to said Clarke of $10.10 for his mileage and witness fee, his residence being 81 miles from Chicago.

2118 Sworn to and subscribed September 30, 1879.

Endorsed upon this Writ are the words: "Oct. 6. Issue Attachment to Marshall of Indiana, H. W. B."

Filed October 6, 1879, William H. Bradley, Clerk.

Stipulation that the objections to the discharge may be dismissed without costs, as follows:

Entitled in the court and cause.

The objections to discharge may be dismissed without costs, *with leave to the objectors to examine the bankrupt at some future time if they desire to do so; and to move to vacate the discharge on the grounds stated in the objections if the proofs warrant.*

2119 *Chicago, May 23, 1882. Edward Roby, Objector in person, and as attorney. E. G. Asay and W. C. Asay, Attorneys for Colehour.*

Endorsed: Filed May 23, 1882, William H. Bradley, Clerk.

Bond for costs.

Filed March 28, 1881.

On the objection of Edward Roby to the discharge of this bankrupt he enters himself as security for costs.

Dated March 28, 1881.

Bonds for costs filed in said District court March 28,
2120 1881, entitled in said court and cause, in which said Edward Roby enters himself as security for costs upon the objections of Crane Brothers' Manufacturing Company to the discharge of the bankrupt. Dated March 28, 1881.

2121 Final oath of Charles W. Colehour, Bankrupt, on his application for discharge.

2123 Sworn to August 15, 1881, and filed April 17, 1883, in court.

NOTE: It may be noted here that the above documents were filed at the time they bear date or about that time in the office of the Register in Bankruptcy, and were not filed by the Clerk of the court until they were delivered to him by the Register in Bankruptcy on the 17th of April, 1883, so far as they were papers required to be filed with the Register and not in court.

Certificate of the Clerk of the District court of the United States to the above documents, giving a list of the documents and certifying that they are true copies, and that the originals are on file in this office.

Attested under the hand of said Clerk and the seal of said Court on the 13th of March, 1890.

EXHIBIT 60.

Certified copies of papers and proceedings in the matter of the bankruptcy of Edward Roby.

Attested by the Clerk of said District Court under the seal thereof.

2125 Petition in bankruptcy in the usual form.

2126 Oath of Petitioner in the usual form.

2127 Endorsed: Filed August 31, 1878, at 4:40 P. M. William H. Bradley, Clerk.

2128 Schedule B 4 of the Inventory, contains the description of said Roby's interests in the lands purchased of H. F. Clark and his brother and sisters as alleged under the Declaration of Trust to Hansbrough, and also under the Declaration of Trust to Charles W. Colehour and himself and also under the assignment from Hansbrough to Charles W. Colehour and himself.

2130 The description closes in the following words:

"Said lands have been in part subdivided by the name of Ironworkers' Addition to South Chicago, and sales have been made therein by said William H. and Charles

W. Colehour as appear by the record, to an amount exceeding $233,000, most of the proceeds of which have been received by Charles W. Colehour, and the interest of your petitioner in said proceeds and in the lands remaining, which amount to about 240 acres or 2,400 lots, your petitioner believes to be over $153,000.

2131 Adjudication of bankruptcy of the petitioner on the 7th day of September, 1878.

2132 Assignee's Report of Sale of Assets of said Bankrupt, describing them, and among others, the interest under said declarations of trust in the property in question, by which the Assignee reports that on Saturday, January 2, 1882,

2136 he sold all of said assets for the amounts named to Edward Roby of Chicago.

2139 That there were no bidders for them separately and that Roby was the highest and best bidder. Shows large and careful notice given and sale to Roby. Among the assets so sold were the interests derived under the Declarations of Trust aforesaid.

2141 Order of Court entered February 2, 1882, approving and confirming the said sales.

2143 The above documents and parts of record are certified by the clerk of the District court of the United States, States under his hand and the seal of said court, March 14, 1890.

2144 EXHIBIT 61.

Discharge of E. Roby in bankruptcy, dated November 23, 1880, in the usual form.

2145 EXHIBIT 62.

Files of the Superior court of Cook county in the case of Welling & Edwards v. William H. Colehour.

Transcript of J. Summerfield, Justice of the Peace, on change of venue from Justice Wallace.

Forcible detainer.

June 17, 1879. Summons issued. The transcript shows personal service and that on July 30, 1879, the case came

on before the justice for hearing on change of venue, and
2146 that it was continued to July 31, 1879. That the plaintiffs were sworn for themselves and the defendants sworn and upon all the evidence the court found the defendant guilty, etc., of forcible detainer of the premises described as rooms 52, 53, 54, 55 in the building numbered 122, 124, 126 and 128 Washington street, Chicago, and judgment for restitution.

August 5, 1879, case appealed to Superior court and bond approved.

Certificate of the Justice to the transcript dated August 9, 1879.

Filed in Superior court August 13, 1879.

2147 Subpœna to witnesses, issued by Wallace, and served on the witnesses July 17, 1879.

2148 Forcible detainer summons, dated June 17, 1879, returned personally served June 20, 1879.

Notice of plaintiff to defendant William H. Colehour, bearing date June 1, 1879, of demand of rent and to quit:

2149 the usual notice in forcible detainer cases, with proof of service upon William H. Colehour, June 9, 1879.

2150 Complaint in forcible detainer, entered before the justice of the peace against William H. Colehour.

2151 Appeal bond by William H. Colehour on appeal from above mentioned judgment of the justice of the peace, dated August 5, 1879.

2152 Filed in Superior Court August 13, 1879.

2153 Notice that on Monday, September 1st, 1879, plaintiff will move the Court to require a sufficient appeal bond. Signed, Edward Roby, plaintiff's attorney. Addressed to William H. Colehour, and served personally upon him August 28th, 1879.

2154 This notice and proof of service, filed in Superior Court September 1, 1879.

Affidavit of value of the premises filed at the same time in said Court.

2155 Judgment in Superior Court for costs and prosedendo, September 10, 1879, taxed in Fee Book 40, page 571.

EXHIBIT 63.

2156 Certifited copy of judgment United States vs. Charles N. Wheeler, Richard D. Lender, William H. Colehour and Jacob Bremer, in debt.

Recites, the cause having this day been called for trial, comes the District Attorney, the defendants Wheeler and Lender failing to appear in person or by attorney. *William H. Colehour and Jacob Bremer appearing by E. G. Asay, Esq.*, their attorney, and the proceedings thereupon
2157 had on March 31st, 1880, whereby the case being at issue a jury was called, and the jury finds for the plaintiff, and finds the debt $30,000 and assesses damages at $22,470; whereupon the defendants William H. Colehour and Jacob Bremer moved the Court for a new trial.

Monday, April 5, 1880, record of the proceeding upon the hearing of the motion for a new trial, which motion is
2158 overruled, and judgment entered for $30,000 debt, and $22,470 damages, besides costs. Certificate of the Clerk of the United States Court under the Seal of that Court, to the transcript.

EXHIBIT 64.

Appearance of certain defendants filed by Edward Roby in the case of Clarke et al. against Colehour et al.,
2159 on September 2, 1882.

Thereby said Roby enters his appearance for Frank W. Harding, Dayton S. Morgan, Joseph Pollak and some 12 other persons, including Julia M. Brewster and the Boones and Hansbroughs.

Endorsed: Filed in Circuit Court, September 2, 1882. Signed, Edward Roby, Solicitor.

2160 EXHIBIT 65.

Copy of Answer of Edward Roby filed in said cause of Clarke et al. v. Colehour et al., October 10, 1882.

This defendant, in his separate answer, sets up the Declaration of Trust by William H. Colehour to William Hansbrough, dated July 31, 1871 (Exhibit 2), assignment thereof (Exhibit 3), and assignment thereof (Exhibit 5) to Charles W. Colehour and this defendant, October 18, 1873, in consideration of $19,466.47, said consideration being the sums which said Hansbrough and said Boone had advanced upon said purchase, with interest. Sets up
2161 the Declaration of Trust set forth above as Exhibit 6.

And proceeds to state that said William H. and Charles W. Colehour have sold and conveyed large numbers of parcels of said land for sums exceeding $234,000, in the aggregate, and have applied the proceeds to their own use; and further, that said William H. and Charles W. Colehour permitted an execution to be issued on a judgment in favor of the Mechanics National Bank against them, and to be levied on a large number of the parcels of said land, of value of over $150,000, and said parcels being sold to satisfy the said judgment, said Colehours permitted the time of redemption to expire, and deed to be issued to the purchaser, whereby said parcels were applied by said Colehours to their own use; and by reason of such sale and deed, and by reason of the sale of said first mentioned parcels, said William H. and Charles W. Colehour's interests in said land is extinguished to the extent of the value thereof, and this defendant is entitled to the only equity of redemption in said land after the satisfaction of said plaintiff's said mortgage.

(Signed) EDWARD ROBY, *pro se.*

2162 EXHIBIT 66.

Deed.

Hancock, Assignee, to Roby.

Dated January 21, 1882.

Recites the sale of all interest in this land by him, as Assignee, to Roby, and therefore conveys. Recites also the proceedings in bankruptcy and the several steps coming down to that sale.

Conveys all the interest in the land in controversy in this suit.

2165 EXHIBIT 67.

Amended Answer of Edward Roby in the case of Clarke et al. v. Colehour et al., filed February 27, 1884.

This Exhibit is found copied in its order among the pleadings in that case, at Vol. 6, page 2519, *post.*

Sets up the same matters as the original answer Exhibit 65, *ante.*

146 U.S. 153

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1891.

EDWARD ROBY,
Plaintiff in Error,
vs.
CHARLES W. COLEHOUR ET AL.,
Defendants in Error.

Error to the Supreme Court of Illinois.

PARTS OF TRANSCRIPT OF RECORD TO BE USED UPON MOTION TO DISMISS OR AFFIRM.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1891.

EDWARD ROBY,
Plaintiff in Error,
vs.
CHARLES W. COLEHOUR ET AL.,
Defendants in Error.

Error to the Supreme Court of Illinois.

PARTS OF TRANSCRIPT OF RECORD TO BE USED UPON MOTION TO DISMISS OR AFFIRM.

STATEMENT.

Four suits in equity were commenced in the Circuit court of Cook county, three of them by Edward Roby, and the fourth by Charles W. Colehour. These cases were consolidated and heard together. The main case was that of Charles W. Colehour *vs.* Edward Roby and William H. Colehour, and the evidence was taken in that case. The decree which was rendered necessarily disposed of the other three cases.

The bill of Charles W. Colehour against Edward Roby, and William H. Colehour was filed January 30, 1890. Answers were filed by both defendants, and a cross-bill by ~~Edward Roby~~ William H. Colehour.

Charles W. Colehour in his bill alleged that the land in controversy was conveyed by Henry F. Clark, and others to William H. Colehour in 1871, who held the title as trustee for Francis M. Corby, Wesley Morrill, William Hansbrough and Charles W. Colehour, that Morrill and Corby transfered their interest to Charles W. Colehour shortly thereafter, and on the 16th of August, 1873, William H. Colehour bought the interest of Hansbrough.

It is further stated that $10,000 was paid to the Clarks, a mortgage of $4,000 assumed and notes given by William H. Colehour for $86,000, which were secured by a deed of trust to Turner, and that in 1873, default having been made, the trustee advertised the property for sale under the power contained in the deed of trust. An arrangement was then made by which Edward Roby acquired an interest in the proceeds of sales of the land which were contemplated by the parties, and William H. Colehour executed a declaration of trust in writing, declaring that Charles W. Colehour should be entitled to one-half of the profits, Edward Roby to one-quarter and William H. Colehour to the other quarter. A part of the land was subdivided into blocks and lots, about two thousand in number.

In 1876 Charles W. Colehour conveyed by deed his interest to William H. Colehour, who, on the first of May, 1879, reconveyed to Charles W. Colehour, subject to the trust theretofore existing.

A bill in equity was filed by the Clarks to forclose the mortgage upon the property, which resulted in a decree directing the payment of the money due and in default a sale of the property, and by virtue of said decree a portion was sold on December 30, 1890, and another on January 29, 1891, and the power of redemption from said

sales ~~was~~ Must be exercised within twelve months from the dates thereof. It was alleged that none of the parties had the financial ability to redeem said land although the property was worth several hundred thousand dollars more than the amount of the indebtedness. The bill prayed for the appointment of a receiver, to whom conveyances were to be made by the Colehours and Roby, and he was authorized to take the necessary steps to raise money to redeem the property for the benefit of the owners thereof.

In addition to the relation growing out of the trust with regard to the land and its proceeds, it was alleged in the bill that Roby had been from the time of the creation of the trust the attorney of Charles W. Colehour and William H. Colehour with regard to the business arising therefrom.

The bill sets forth four judgments rendered against Charles W. Colehour and William H. Colehour in 1878 and 1879, the issue of executions on said judgments and sales of the property or portions thereof as the property of the defendants in the judgments, and the acquisition of the titles, derived from such sales, by Roby, and that by virtue thereof he claimed to have acquired all the title and interest of the two Colehours. It was asserted by the Colehours that Roby could not acquire title under such judgments adversely to them because of the relations growing out of the trust and also because of the relation between them of attorney and client, and it was claimed that he was only entitled to such sum as he might have advanced in procuring such titles, in an accounting to be had between them.

It also appeared in the bill that Roby had procured a deed from William H. Colehour of his interest in the

premises, which was alleged to have been obtained by false representations and without any adequate consideration.

The bill is to be found in the record at pages 7–33.

The answer of Roby is to be found in the record at pages 241, 290.

Issues were made and the trial court granted the relief prayed for by Charles W. Colehour in the original bill and William H. Colehour in the cross-bill; holding that Roby was debarred from purchasing and setting up an adverse title to them, and that the conveyance by William H. Colehour was obtained in such a manner as to justify the court in setting aside the conveyances.

A full statement of the case is to be found in the decree rendered by the Circuit court of Cook county and the opinion of the Supreme court of Illinois, where the case was heard upon an appeal. The decree and opinion are as follows:

DECREE.

TRANSCRIPT OF RECORD, PAGES 296–356.

IN THE CIRCUIT COURT OF COOK COUNTY.

STATE OF ILLINOIS, } ss.
COOK COUNTY, }

Charles W. Colehour
v.
Edward Roby and William H. Colehour. } *Bill in Equity.*

William H. Colehour
v.
Edward Roby and Charles W. Colehour. } *Cross-Bill in Equity*

Edward Roby
v.
James E. Clarke and Charles W. Colehour.

Edward Roby
v.
Jared Myers Clarke and Charles W. Colehour.

Edward Roby
v.
Charles W. Colehour.

This cause coming on for a final hearing upon the original amended bill in *Colehour* v. *Roby et al.*, the answers of the defendants thereto, the cross-bill of William H. Colehour, and the answer of Edward Roby thereto, and the replications, and it appearing that the said Charles W. Colehour has elected not to make answer to the cross-bill, but confesses the same to be true; and also upon the pleadings in the last three above

named cases; and the court having heard the evidence and argument of counsel, doth find that Henry F. Clarke, Robert D. Clarke, Harriet S. Clarke and Sarah J. Clarke conveyed to William H. Colehour, by deed, dated July 18, 1871, which was recorded August 2, 1871, and by confirmatory deed, dated July 7, 1873, and recorded August 22, 1873, the following described real estate:

Commencing at the south-west corner of section 8, township 37 north, of base line range 15 east of the 3d P. M., running thence north along the west line of said section, 39 chains and 90 links to a corner, thence east parallel with the south line of the section, 42 chains and 3 links to a point in the center of the Michigan Southern and Northern Indiana railroad as located, when said original deed was made, thence on a course north 33 degrees and 30 minutes, east 20 chains and 25 links more or less to the water's edge on the shore of Lake Michigan and thence on lake shore, close to the water's edge on course south 25 degrees and 30 degrees minutes more or less, east 23 chains and 7 links to an intersection with the state line at water's edge, thence south along the state line 39 chains and 69 links, more or less to the south-east corner of said section 8, thence west along the south line of said section, 64 chains and 52 links to the place of beginning; containing $261\frac{22}{100}$ acres, more or less, the land for right of way over the track just described, conveyed to the Michigan Southern and Northern Indiana Railroad Company, and to the Pittsburg and Fort Wayne and Chicago Railroad Company previous to the making of the said original deed not being included, and the north three-quarters of the east half of section 17, township 37 north, range 15, all in Cook county, Illinois, containing in all four hundred and six acres of land.

Subject to a mortgage for four thousand dollars to Mary P. M. Palmer, and that ten thousand dollars was paid in cash for such conveyance, and the said William H. Colehour executed his notes for eighty-six thousand dollars, balance of the purchase money, bearing interest at seven per cent., payable semi-annually, the principal payable on or before one, two, three, four and five years, and for the purpose of securing such notes, executed a trust deed conveying such premises to Voluntine C. Turner.

That William Hansbrough, Charles W. Colehour, Wesley Morril and Francis M. Corby were interested in the net profits to be derived from the sale of said premises; that the said William Hansbrough sold and assigned his interest in said profits to Charles W. Colehour and Edward Roby, and that the said Charles W. Colehour acquired the interest therein of Francis M. Corby and Wesley Morril.

The court finds that at the time of the delivery of said Hansbrough's assignment to Colehour and Roby, said Roby paid to said Hansbrough $4,400 by his notes suqsequently paid.

That in the year 1873 a contract and arrangement was made between William H. Colehour, Charles W. Colehour and Edward Roby for the purpose of subdividing and selling said lands, and realizing profits therefrom.

That in order to have written evidence of such contract and arrangement, the said William H. Colehour during the month of October, 1873, executed the following declaration of trust, which was accepted by the said Charles W. Colehour and Edward Roby, and which is still in full binding force, to wit:

I, William H. Colehour, being the owner in fee of the

south half of section 8 and part of the north-east quarter of same, and of the north-east three-quarters of section 17, all in T. 37 N., R. 15 E. 3d P. M., Cook county, as conveyed me by deed of Henry F., Robert D., Harriet S. and Sarah J. Clarke, dated July 18, 1871, and recorded August 2, 1871, in Cook county, Ills., do hereby acknowledge that after the payment of all sums of money due on any notes of mine secured upon said land, the payment of all interest payable on account of said notes, the payment of all moneys advanced on account of any development of said land, or on account of any industry on or beneficial to said land, and the payment of all sums of money advanced by C. W. Colehour and Edward Roby, or hereafter to be advanced on account of anything pertaining to said land, then Edward Roby shall be entitled to the one-fourth part of the net profits of said land, Charles W. Colehour shall be entitled to the one-half of the net profits of said land, and I shall be entitled to the one-fourth part of the net profits of said land.

This shall apply to the heirs, executors, administrators of any and all of the parties above mentioned—but no assignment of any interest shall be made without the written consent of all the parties hereto first obtained.

And this division of interest is in consideration of money advanced by the above mentioned Roby and C. W. Colehour on behalf of said land and subject to any agreement of mine with reference to said land heretofore made by me concerning any division into lots, conveyances, management thereof, or of any indebtedness incurred in behalf of said land. And I hereby make, constitute and appoint Charles W. Colehour my true and lawful attorney in fact to sell said lands by lot or block as he may deem best, and to give deeds for the same with proper notes

back for deferred payments, and to do this shall have full power to sign my name to any deed or instrument and acknowledge the same in as full a manner as I could myself, with Edward Roby as his substitute.

And I do hereby confirm all acts done by my attorney in fact, and also his substitute in this behalf as my acts, and as binding on me or my heirs, executors or administrators.

WILLIAM H. COLEHOUR. [SEAL.]

And that the declaration of trust purporting to have been made by William H. Colehour, of date August 16, 1873, the court finds was not the one agreed upon between said Roby and the Colehours; that the said William H. Colehour executed to Charles W. Colehour a power of attorney, dated May 29, 1873, which reads as follows:

KNOW ALL MEN BY THESE PRESENTS, That I have, and by these presents do hereby make, constitute and appoint Charles W. Colehour my true and lawful attorney in fact, for me and in my place and stead, to take the possession, sole control and charge of and over the following described land, to wit: (See description heretofore given in the deed from Henry F. Clarke and others to William H. Colehour); over all of which land I give my said attorney absolute power and control to lay out in lots, blocks and streets, to donate portions thereof to persons or corporations for locations for manufacturing purposes, to subscribe for the stock of any company, pay for the same and charge the same to me, to make all sales of lands in lots or blocks, make deeds in my name and acknowledge them for me, to receive all money and notes for any deferred payments and collect the same, to act as trustee in all trust deeds, receiving all notes, to borrow money when required and pledge said notes, to pay all

taxes and assessments, to pay off any and all encumbrances of mine, all debts of mine, all notes he may give for any purposes, to bid in his own name any property sold under pledge of securities of mine, to buy up all judgments against me, to employ any lawyer for any of my law business, and pay him to begin any suit, defend any suit for me, to dismiss any of my suits or defenses at his option, to settle any suits, and when the Clarke mortgage for $86,000, and the Palmer mortgage for $4,000, and all other of my indebtedness now existing, or which may hereafter come into existence, are fully paid and the land free of all charges, then this power shall cease. I hereby agree to pay him out of the proceeds of sales of lands the sum of $5,000 each year from the date hereof for his services, and his power of attorney is made continuous and irrevocable until such time as the land is free and clear, and until my said attorney is paid all sums he has advanced, and his salary is fully paid. Hereby ratifying and confirming all my said attorney may do in my behalf. I hereby set my hand and seal this 29th day of May, 1873.

WILLIAM H. COLEHOUR. [SEAL.]

STATE OF ILLINOIS, }
COOK COUNTY. } ss.

I, Charles G. Harris, a notary public in and for the said county and in the said state, do hereby certify that William H. Colehour, a bachelor, personally known to me to be the same person whose name is subscribed to the foregoing instrument, appeared before me this day in person, and acknowledged that he signed, sealed and delivered said instrument as his free act and deed for the

uses and purposes therein set forth. Given under my hand and notarial seal this second day of June, 1875.

CHARLES G. HARRIS,
Notary Public.

(Transcript of record, 304.)

The court finds that the minds of the parties did not agree upon said instrument dated August 16, 1873, but that the declaration of trust above copied was agreed to by all the parties and was delivered to said Roby as containing the true declaration of the interests of the parties and it must be so treated and held.

That in December, 1873, the south half of said section eight was subdivided and platted into blocks and lots, streets and alleys and said lots being about two thousand in number and a plat was made thereof which was recorded in the proper office; that improvements were made by grading streets, making ditches, building bridges and constructing sidewalks and that thereafter and prior to some time in the year 1878 many of said lots were sold and conveyed by the said William H. Colehour and the said lots released from the deed of trust executed to the said Voluntine C. Turner to secure the notes executed by said William H. Colehour for a part of the purchase money; that in 1873 the following part of said premises, to wit: twenty-six (26) and sixty-seven one-hundredths acres of land ($\frac{6}{1}\frac{7}{0}$) situate in the north-west corner of the south-west, one-quarter of section eight (8), township 37 north, range 15 east of the 3rd P. M., being 485 feet in width, north and south by twenty-three hundred and twenty-three feet (2,323½) and one-half foot in length, east and west, in Cook county, Illinois was coveyed by the said William H. Colehour with the consent and approval of the said Charles W. Colehour

and with the knowledge and approval of Edward Roby to Egbert Gulick, president of the Nes Silicon Steel Company which was released from the said deed of trust, this land is known as the Silicon land.

That on the twenty-second day of September, 1876, Charles W. Colehour quitclaimed, released and conveyed to William H. Colehour all his right, title and interest in and to the said premises described in the deed of the said Clarkes to the said William H. Colehour.

That on the first day of May, 1879, the said William H. Colehour executed a deed to Charles W. Colehour which reads as follows.

KNOW ALL MEN BY THESE PRESENT, that I, William H. Colehour, a bachelor, do, in consideration of one dollar to me in hand paid by Charles W. Colehour, of the second part, grant, bargain and sell to Charles W. Colehour, the following described land, to wit:

The north half of the south-east quarter, and the north-east quarter of section 17, T. 37, N., R. 15 E., 3rd P. M., and the following lots and blocks in Ironworkers' Addition to South Chicago, being a subdivision of the south half of fractional section 8, T. 37 N., R. 15 E., 3rd P. M., Cook county, Illinois. Lots 1 to 18, block 1; lots 1 to 23, block 2; lots 4 and 5, block 3; lots 1, 2, 10, 11, 12, block 4; lots 1 to 11, block 5; lot 1, block 6; lot 1, block 7; lot 1, block 8; block 9; lots 5 to 14 and 28 to 46, block 10; lots 40, 41 and 44 to 48, block 11; lots 47 and 48, block 12; lots 6 to 48, block 15; lots 7 to 22 and 25 to 48, block 16; lots 6 to 41, block 17; lots 4 to 33, block 18; lots 1 to 32, block 19; lots 8 to 30, block 20; lots 1 to 55, block 22; lots 1 to 43, block 23; block 24 entire; lots 1 to 21 and 25 to 48, block 25; lots 1 to 48, block 26; lots 1 to 24 and 29 to 39, block 27; lots 5, 6, 7,

block 28; lots 5, 6, 7, 8, 21, 22, block 29; lots 8, 9, 10, 11, 18, 19 and 20, 25, 26 and 27 to 33 and 45 to 48, block 30; block 31 entire; lots 10 and 11 and 25 to 48, block 32; lots 8, 15, 16, 17 and 18 to 29 and 40, 41 and 47, block 33; lots 2 to 7 and 18 to 32, 39, 42, 43 and 44, block 34; lots 6, 13, 20, 21, 22, 23, 24 and 25 to 30 and 42, 43 and 44, block 35; lots 1 to 46, block 36; block 37 entire; lots 5 to 48, block 38; block 39 entire; block 40 entire; block 41 entire; block 42 entire; block 43 entire; block 44 entire; block 45 entire, and block 46 entire.

Also the following piece of land situate in the county of Cook and State of Illinois, commencing at the point of intersection of the Lake Shore and Michigan Railroad right of way as located July 18, 1871, that is the center line of said right of way, with the east and west line of the center of Sec. 8, T. 37 N., R. 15 E. 3rd P. M., and running thence on a course north 30° and 30′ east 20 chains and 25 links, more or less, to Lake Michigan, thence along the shore of Lake Michigan on a course south 25° and 30′, more or less, east to the intersection of the state line, thence south along the state line, to a point fifty feet north of the center of the said right of way; thence on a course north-westerly, along said right of way to the point of beginning, all in fractional Sec. 8, T. 37 N., R. 15 E. 3rd P. M., Cook county, Illinois.

This deed is made and delivered subject to a declaration of trust made by me August 16, 1873, and the above described land is conveyed subject to the terms of said trust, the original of which declaration of trust is in the possession of Charles W. Colehour, grantee hereof.

I also grant, bargain and sell to Charles W. Colehour the west ½ of north-west quarter of Sec. 17, T. 37 N.,

R. 15 E. 3rd P. M., Cook county, Illinois, subject to my declaration of trust, of date February 22, A. D. 1876, held by Charles W. Colehour.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this 1st day of May, A. D. 1879.

WILLIAM H. COLEHOUR. [SEAL.]

STATE OF ILLINOIS, } ss.
COUNTY OF COOK. }

I, Charles G. Harris, a notary public in and for the county and state aforesaid, do hereby certify that William H. Colehour, who is personally known to me to be the same person whose name is subscribed to the foregoing instrument, appeared before me this day in person and acknowledged that he signed, sealed and delivered the said instrument as his free and voluntary act, for the uses and purposes therein set forth.

GIVEN under my hand and notarial seal this 1st day of May, A. D. 1879.

Charles G. Harris, Notarial Seal, Cook Co.

CHARLES G. HARRIS,
Notary Public.

(Transcript of record, 306.)

Which was acknowledged on the 1st day of May, 1879, and that such deed was executed and delivered by the grantor to the grantee subsequent to the date of the acknowledgment thereto attached, and that the said Edward Roby knew of the existence of the deed and the claims thereunder before the execution and delivery of the deed from William H. Colehour and wife to him, dated 6th day of January, 1887, in and by which deed

Charles W. Colehour became the trustee in the place of William H. Colehour.

That the said William H. Colehour, joined by his wife, made and executed to the said Edward Roby on the 12th day of January, 1887, the following deed, to wit:

THIS INDENTURE WITNESSETH, that the grantor William H. Colehour, of the village of Hyde Park in the county of Cook and State of Illinois, for the consideration of one dollar, and other good and valuable considerations, conveys and quitclaims to Edward Roby, of the city of Chicago, county of Cook, and State of Illinois, all interest in the following described real estate, to wit:

All section eight (8) and all section seventeen (17) in township thirty-seven (37) north, range fifteen (15) east of the third principal meridian, situated in county of Cook and State of Illinois.

And Carrie Stirmel Colehour, wife of said William H. Colehour, joins with her said husband in this deed for the purpose of relinguishing her right of dower in and to the said lands above described, and each and every part thereof, and doth hereby relinguish unto the said Roby, grantee above named, all her right of dower in and to the said lands and each and every part thereof.

Dated this sixth day of January, A. D. 1887.

WILLIAM H. COLEHOUR, [SEAL.]
CARRIE STIRMEL COLEHOUR. [SEAL.]

STATE OF ILLINOIS, } ss.
COUNTY OF COOK. }

I, Richard D. Lender, a notary public in and for said county in the state aforesaid, do hereby certify that William H. Colehour and Carrie Stirmel Colehour, his wife,

personally known to me to be the same persons whose names are subscribed to the foregoing instrument, appeared before me this day in person, and acknowledged that they signed, sealed and delivered the said instrument as their free and voluntary act for the uses and purposes therein set forth, including the release and waiver of the rights of homestead.

Given under my hand and notarial seal this 12th day of January, A. D., 1887. R. D. LENDER,

Notary Public.

Richard D. Lender,
Notarial Seal,
Cook Co., Ills.

No. 790,035. Filed for record January 14, A. D., 1887, at 4 P. M.

WILEY S. SCRIBNER,

Recorder.

(Transcript of record, 310.)

And also the following instrument or assignment, to wit :

In consideration of one dollar and other good and valuable considerations, I hereby sell, assign, transfer and set over unto Edward Roby for his own use and benefit, all interest in all promisory notes and demands due or owing to me on account of the sale of any lands, lots or other property in Iron Worker's Addition to South Chicago, or in any part of sections eight (8) and seventeen (17) in township thirty-seven (37), range (15) east of the third principal meridian; and in any and all securities on such lands, lots, or premises, and each and every part and parcel thereof; and all claims to said land and each and every part thereof; and if any title or titles to any parts or parcels of said sections eight (8) and seventeen (17) shall become vested in me at any time hereafter by virtue

of any claims that I now have, I hereby grant and convey each and every such parcels to said Roby so as to vest the legal title thereto in him. And I hereby grant and convey to said Roby all claims to said lands, and all legal and equitable titles to each and every part or parcel of said lands which are now vested in me.

Witness my hand and seal at Chicago this sixth day of January, A. D. 1887.

WILLIAM H. COLEHOUR. [SEAL.]

(Transcript of record, 311.)

STATE OF ILLINOIS, } ss.
COUNTY OF COOK. }

I, Richard D. Lender, a notary public in and for said county, in the state aforesaid, do hereby certify that William H. Colehour, personally known to me to be the same person whose name is subscribed to the foregoing instrument, appeared before me this day in person and acknowledged that he signed, sealed and delivered the said instrument as his free and voluntary act for the uses and purposes therein set forth.

Given under my hand and notarial seal, this 12th day of January, A. D. 1887.

RICHARD D. LENDER,

[NOTARIAL SEAL.] *Notary Public.*

That on July 2, 1877, William H. Colehour executed a deed conveying to Jared Myers Clarke the following described land:

From the point of intersection of the east and west center line of section eight (8), township thirty-seven (37) north, range fifteen (15), with the center of the Michigan Southern and Northern Indiana Railroad, as located

when said original deed was made; thence on a course north thirty-three (33°) degrees and thirty (30′) minutes east twenty (20) chains and twenty-five (25) links, more or less, to the water's edge on the shore of Lake Michigan, and thence on lake shore close to water's edge on course south, twenty-five degrees (25°) and thirty (30′) minutes, more or less, east twenty-three (23) chains and seven (7) links to an intersection with the state line at water's edge; thence south along the state line to the north side of the Michigan Southern and Northern Indiana Railroad right of way, and thence north-westerly along said right of way to the place of beginning, all in section eight (8), township thirty-seven (37) north, range fifteen (15) east third (3rd) principal meridian, Cook county, Illinois.

That at the September term of the Superior court of Cook county, 1878, a judgment was rendered against Charles W. Colehour and William H. Colehour by the Superior court of Cook county in favor of Oliver H. Horton, receiver of the German Savings Bank, for $4,-113.58 and costs; that an alias execution was subsequently issued, dated the 3d of July, 1882, thereon, which was levied upon the following described lots and lands, to wit:

As set forth in the copy of the following deed, to wit:

WHEREAS, Oliver H. Horton, receiver of the German Savings Bank of Chicago, did, at the September term, A. D. eighteen hundred and seventy-eight (1878), of the Superior court of Cook county, in the State of Illinois, recover a judgment against William H. Colehour and Charles W. Colehour for the sum of forty-one hundred and thirteen and $\frac{58}{100}$ dollars and costs of suit upon which judgment an alias execution was issued, dated the 3d day

of July, A. D. eighteen hundred and eighty-two, directed to the sheriff of Cook county to execute, and by virtue of said execution, Orrin L. Mann, then sheriff of said county, levied upon the premises hereinafter described, and the time and place of the sale thereof having been duly advertised, according to law, the same was struck off and sold to Rollin R. Landis, on the thirty-first day of July, A. D. 1882, he being the best and highest bidder therefor.

NOW, THEREFORE, KNOW ALL MEN BY THESE PRESENTS, that I, Seth F. Hanchett, sheriff of said county of Cook and successor of the said Orrin L. Mann, late sheriff as aforesaid, in consideration of the premises, do hereby convey to the said Rollin R. Landis, his heirs and assigns, the following described lots or parcels of land, to wit:

All of block nineteen (19), except lot thirty-two (32) thereof, lots twenty-two (22) and twenty-three (23) in block eighteen (18), lots twenty-five (25), twenty-six (26), twenty-seven (27), twenty-eight (28), twenty-nine (29), thirty (30), thirty-one (31), thirty-two (32), thirty-three (33), thirty-four (34), thirty-five (35), thirty-six (36), thirty-seven (37), thirty-eight (38), thirty-nine (39), forty (40), forty-one (41), forty-two (42), forty-three (43), forty-four (44), forty-five (45), forty-six (46) and forty-seven (47), in block fifteen (15). All of block twenty-two (22), lots seventeen (17), eighteen (18), nineteen (19), twenty (20), twenty-one (21), twenty-two (22), twenty-three (23) and twenty-four (24) in block twenty-six (26).

Lots one (1), two (2), three (3), four (4), five (5), six (6), seven (7), eight (8), nine (9), ten (10), eleven (11), twelve (12), thirteen (13), fourteen (14), fifteen (15),

sixteen (16), seventeen (17), eighteen (18), nineteen (19), twenty (20), twenty-one (21), twenty-two (22), twenty-three (23) and twenty-four (24), in block thirty-six (36), all of the aforesaid lots and blocks being situate in Ironworkers' Addition to South Chicago, being a subdivision of the south fractional half of fractional section eight (8), in township thirty-seven (37) north, range fifteen (15) east of the third principal meridian.

Also convey the north half of the south-east fractional quarter, and the north-east fractional quarter of section seventeen (17), in township thirty-seven (37) north, range fifteen (15) east of the third principal meridian.

TO HAVE AND TO HOLD the same with all the appurtenances thereto belonging to said Roland R. Landis, his heirs and assigns forever.

WITNESS my hand and seal this first day of November, A. D. 1883.

SETH F. HANCHETT,

[SEAL.] *Sheriff.*

STATE OF ILLINOIS, }
COUNTY OF COOK. } ss.

I, C. R. Matson, a notary public in and for said county, do hereby certify that Seth F. Hanchett, Sheriff of said Cook county, personally known to me to be the same person whose name is subscribed to the within deed, appeared before me this day in person and acknowledged that he signed, sealed and delivered the said deed as such sheriff, as his free and voluntary act for the uses and purposes therein set forth.

GIVEN UNDER MY HAND AND NOTARIAL SEAL this first day of November, A. D. 1883.

C. R. Matson,
Notary Public,
Chicago,
Cook Co., Ills.

C. R. MATSON,
Notary Public.

No. 551,560, recorded June 6th, A. D. 1884, at 11 o'clock A. M.

JAS. W. BROCKWAY,
Recorder.

The following is a copy of the deed by which George F. Harding and wife conveyed to Edward Roby on February 9, 1888, all their right, title and interest in the lands described in said deed, to wit:

THIS INDENTURE witnesseth that the grantors, George F. Harding and Adelaide M. Harding, his wife, of the city of Chicago, in the county of Cook and State of Illinois, for the consideration of forty-seven hundred and twenty-one dollars, convey and quitclaim to Edward Roby, of the city of Chicago, county of Cook, and State of Illinois, all interest in the following described real estate, to wit:

The north three-quarters of the east fractional half of section seventeen (17), the west half of the north-west quarter of section seventeen (17), the south half of section eight (8), that part of the north half of said section eight (8) lying east of a line drawn from the point, where the south line of said north half of said section (8) intersects a line drawn through the middle of the right of way of the Lake Shore and Michigan Southern railroad, north twenty degrees east to Lake Michigan; all said lands being in township thirty-seven (37) north, range fifteen (15) east of the third principal meridian, situate in the county of Cook, in the State of Illinois, hereby releasing and waiv-

ing all rights under and by virtue of the homestead exemption laws of this state.

Dated this eighth day of February, A. D. 1888.

GEO. F. HARDING. [SEAL.]
ADELAIDE M. HARDING. [SEAL.]

STATE OF ILLINOIS, } ss.
COUNTY OF COOK. }

I, Elias R. Bowen, a notary public, in and for said county in the state aforesaid, do hereby certify that George F. Harding and Adelaide M. Harding his wife, personally known to me to be the same persons whose names are subscribed to the foregoing instrument, appeared before me this day in person and acknowledged that they signed, sealed and delivered, the said instrument as their free and voluntary act for the uses and purposes therein, set forth, including the release and waiver of the right of homestead.

GIVEN UNDER MY HAND AND NOTARIAL SEAL ninth day of February, A. D. 1888.

ELIAS R. BOWEN,
Notary Public, Cook County, Illinois.

E. R. Bowen, Notary Public,
Chicago, Ill., Cook Co,
Insurance & Real Estate.

No. 923,539, filed for record Feb. 10, A. D. 1888, at 3 P. M.

WILEY S. SCRIBNER,
Recorder.

That by deed, dated March 26, 1884, said Roland R. Landis and Ella, his wife, conveyed to Edward Roby for a consideration of six hundred (600) dollars the lands mentioned in the following deed:

THIS INDENTURE, made this 26th day of March, in the year of our Lord, one thousand eight hundred and eighty-four, between Roland R. Landis and Ella Landis, his wife, of the city of Chicago, and the county of Cook and State of Illinois, party of the first part, and Edward Roby, of the city of Chicago, in the county of Cook and State of Illinois, party of the second part:

WITNESSETH, That the said party of the first part, for and in consideration of the sum of six hundred (600) dollars in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, and the said party of the second part forever released and discharged therefrom, have remised, released, sold, conveyed and quitclaimed, and by these presents do remise, release, sell, convey and quitclaim unto the said party of the second part, his heirs and assigns forever, all the right, title, interest, claim and demand which said party of the first part have in and to the following described lots, pieces or parcels of land, situated in the county of Cook and State of Illinois, and known and described as follows, to wit:

The north half (½) of the south-east fractional quarter (¼) of section seventeen 17), in township thirty-seven (37) north, range fifteen (15) east of the third principal meridian. Also all of block nineteen (19), except lot thirty-two (32) thereof, lots twenty-two and twenty-three, in block eighteen, lots twenty-five, twenty-six, twenty-seven, twenty-eight, twenty-nine, thirty, thirty-one, thirty-two, thirty-three, thirty-four, thirty-five, thirty-six, thirty-seven, thirty-eight, thirty-nine, forty, forty-one, forty-two, forty-three,forty-four, forty-five, forty-six and forty-seven, in block fifteen. All of block twenty-two (22), lots seventeen, eighteen, nineteen, twenty, twenty-one, twenty-two, twenty-three and twenty-four, in block twenty-six,

lots one, two, three, four, five, six, seven, eight, nine, ten, eleven, twelve, thirteen, fourteen, fifteen, sixteen, seventeen, eighteen, nineteen, twenty, twenty-one, twenty-two, twenty-three and twenty-four, in block thirty-six (36). All of the aforesaid lots and blocks being situate in Iron Worker's Addition to South Chicago, being a subdivision of the south fractional half of fractional section eight (8), in township thirty-seven (37) north, range fifteen (15), east of the third (3) principal meridian.

TO HAVE AND TO HOLD the same, together with all and singular the appurtenances and privileges thereunto belonging or in anywise thereunto appertaining, and all the estate, right, title, interest and claim whatever, of the said party of the first part, either in law or equity, to the only proper use, benefit and behoof of the said party of the second part, their heirs and assigns forever.

And the said party of the first part hereby expressly waive and release any and all right, benefit, privilege, advantage and exemption under or by virtue of any and all statutes of the State of Illinois, providing for the exemption of homesteads from sale on execution or otherwise.

IN WITNESS WHEREOF, the said party of the first part have hereunto set their hands and seals the day and year first above written.

ROLAND R. LANDIS. [SEAL.]
ELLA LANDIS. [SEAL.]

Signed, sealed and delivered in the presence of

STATE OF ILLINOIS, }
COUNTY OF DU PAGE. } ss.

I, Robert A. Childs, a notary public in and for the said county in the state aforesaid, do hereby certify that Roland R. Landis and Ella Landis, his wife, personally known

to me to be the same persons whose names are subscribed to the foregoing instrument, appeared before me this day in person and acknowledged that they signed, sealed and delivered the said instrument as their free and voluntary act for the uses and purposes therein set forth, including the release and waiver of the right of homestead.

Given under my hand and notarial seal this 27th day of March, A. D. 1884.

Robert A. Childs,
Notarial Seal.
Du Page County.
Illinois.

ROBERT A. CHILDS,
Notary Public.

No. 551,559. Filed for record this 6th day of June, A. D. 1884, at 11 o'clock A. M.

JAMES W. BROCKWAY,
Recorder.

Which lots and lands were sold and the said execution to Roland R. Landis and the sheriff's deed was made and delivered to the said Landis dated November first, 1883.

That at the June term, 1878, a judgment was rendered by the Superior court of Cook county, against Charles W. Colehour, in favor of Charles B. McCoy, for the use of Frank W. Harding for $3,700 and costs, on which execution was issued and levied upon the following described premises, to wit: As set forth in the following described copy of sheriff's certificate issued to George F. Harding.

STATE OF ILLINOIS, } ss.
COUNTY OF COOK. }

I, Seth F. Hanchett, Sheriff of Cook county, do hereby certify that by virtue of a certain pluries writ of execution to me directed from the Superior court of Cook

county, issued on a judgment rendered at the June term, A. D. 1878, of said court in favor of Charles B. McCoy for the use of Frank W. Harding, plaintiff against Charles W. Colehour, defendant, for thirty-seven hundred (3,700) dollars and costs, dated the 27th day of April, eighteen hundred and eighty-five.

I did, on this 23d day of May, eighteen hundred and eighty-five, at ten o'clock in the forenoon at the east door of the court house in the city of Chicago in said county (the time and place aforesaid having been duly advertised according to law) sell at public vendue, all the right, title and interest of said defendant, in and to the following described tracts or lots of land, to wit:

The north three-quarters (¾) of the east fractional half (½) of section seventeen (17) for one hundred (100) dollars; the west half (W. ½) of the north-west quarter (N. W. ¼) of section seventeen (17) for one hundred (100) dollars; the south half of section eight (8), except lots seven (7), eight (8), nine (9), ten (10) and eleven (11) in block eight (8) of Ironworkers' Addition to South Chicago for two hundred and fifty (250) dollars; that part of the north half (N. ½) of said section eight (8) lying east of a line drawn from the point where the south line of said north half of said section intersects a line drawn through the middle of the right of way of the Lake Shore and Michigan Southern Railroad land north twenty degrees east to Lake Michigan for fifty (50) dollars; all said premises being in township thirty-seven (37) north, range fifteen (15) east of the third principal meridian, and situate in the county of Cook and State of Illinois, to George F. Harding, for the total sum of five hundred (500) dollars; said sum being the highest and best bid offered for said tracts or lots of land, each of said

parcels having been first offered in separate tracts or lots, without receiving any bid or bids therefor, or for any part thereof.

And the purchaser will be entitled to a deed for the premises so sold on the 24th day of August, eighteen hundred and eighty-six, unless the same shall be redeemed as provided by law.

SETH F. HANCHETT,
Sheriff.
By C. R. MATSON,
Deputy Sheriff.

STATE OF ILLINOIS, } ss.
COOK COUNTY. }

No. 627,428. Filed for record May 25, A. D. 1885, at 11 A. M.

WILEY S. SCRIBNER,
Recorder.

Which said lots and premises were sold on the twenty-third day of May, 1885, to George F. Harding for the sum of five hundred dollars and a deed issued by the sheriff to him on the expiration of redemption from said sale; that on the twenty-fourth day of September, 1879, a judgment was rendered by the Superior court of Cook county against Charles W. Colehour and William H. Colehour in favor of Crane Brothers Manufacturing Company for $3,591, on which execution was issued and levied on the following described lots and premises, to wit:

Crane Bros. Mfg. Co.
vs.
C. W. and Wm. H. Colehour. } *Judgment, Sept. 24, 1879, $3,591.*

Date of sale under above judgment, September 14, 1886. Sold to Edward Roby. Amount of sale, $5,129.52.

PREMISES SOLD—IRONWORKERS' ADDITION TO SOUTH CHICAGO.

Lots 4, 5, 6, 7, 8, 9, 10, 11, 12, 13 and 14, block 2; lots 2, 3, 4, 7, 8, 9, 10 and 11, block 5; lot 9, block 8; lots 5, 6, 7, 8 and 9, block 10; lots 13, 14, 43, 44, 45 and 46, block 10; lots 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 18, 19, 20 and 21, block 15; lots 22, 23, 24, block 15; lot 48, block 15; lots 7, 8, 10 and 11, block 16; lots 12, 13, 14, 15, 16 and 17, block 16; lots 18, 19, 20, 21, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46 and 47, block 16; lots 25, 26, 27, 28, 29, 30, 31, 32, 33, 34 and 48, block 16; lots 1, 2, 33, 34, 35 and 36, block 17; lots 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 29, 30, 31, 32, 38, 39, 40 and 41, block 17; lots 21, 22, 23, 24, 25, 26, 27 and 28, block 17; lots 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 24, 25, 26, 27, 28 and 33, block 18; lots 21, 29, 30, 31 and 32, block 18; lot 31, block 20; lots 21, 22, 23, 24, 25, 26, 27, 28, 29 and 30, block 23; lots 31, 32, 33, 34, 35, 36, 37, 38, 39 and 40, block 23; lots 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47 and 48, block 25; lots 25, 26, 27, 28, 29, 30, 31, 32 and 33, block 25; lots 34, 35, 36 and 37, block 25; lots 25, 26, 27, 28, 29 and 30, block 26; lots 31, 32 and 33, block 26; lots 1, 2, 3, 4, 5, 19, 20, 21, 22, 23, 24, 29, 30, 31, 32, 38 and 39, block 27; lots 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17 and 18, block 27; lot 43, block 27; lots 5, 6 and 7, block 28; lots 5, 6, 7, 8 and 35, block 29; lots 21 and 22, block 29; lot 17, block 30; lots 8, 18, 19, 20, 25, 26, 34, 45, 46, 47, 48, block 30; lots 1 and 2, block 33; lots 15, 16 and 17, block 33; lots 8, 21, 22, 23, 24, 25, 26, 27, 28, 29, 40, 41 and 47, block 33; lots 7, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29,

30, 31, 32, 39, 42, 43 and 44, block 34; lots 6, 13, 20, 21, 22, 25, 26, 27, 28, 29, 30, 35, 42, 43, 44, block 35; lots 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, block 36; lots 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, block 38; lots 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, block 38; all of block 39; all of block 40; lots 1 to 48, all inclusive, block 41.

All that certain strip or parcel of land laid out upon the plat of said Ironworkers' Addition and thereon designated as private property reserved for railroad purposes, except such parts thereof as are parts of blocks 19 and 22 of said Ironworkers' Addition.

Shffs. certificate to Roby. Exon. No. 52,011, ret. satisfied Oct. 22, '86.

Sheriff's deed to Edward Roby and *no conveyances by them of above premises.*

CHICAGO, January 23, 1890.
OTTO PELTZER & CO.

All of which are sold to Edward Roby on the 14th day of September, 1886, and sheriff's deeds were subsequently executed and delivered to the said Roby and George F. Harding, respectively, purporting to covey said premises. (Transcript of Record, 313, 327.)

That the said Edward Roby from the time of the making of the arrangement and contract in the Declaration of Trust mentioned between him and the said Charles W. Colehour and William H. Colehour, in October, 1873, acted as attorney, solicitor and counsel for the said Colehours with reference to said property and joint adventure in which they were engaged, until after the making of the said deed, and instrument of assignment in writing to the said Edward Roby by the said William H. Colehour

and wife in January, 1887, and that the relation of attorney and client existed between them during said period of time. (Transcript of Record, 327.)

That said Edward Roby procured a deed of conveyance from the said Landis and another deed from the said Harding for the premises sold as hereinbefore stated under judgment and execution, and that the said Edward Roby holds such title as he acquired by virtue of said deeds, as well as by the deed of the sheriff, as hereinbefore mentioned, executed to him, except lots 18 and 19, in block 16, and lots 15, 16 and 17, in block 33, as trustee for himself and said Charles W. Colehour and William H. Colehour in proportion to their respective interests, as established by the declaration of trust made as aforesaid in October, 1873.

That the said Edward Roby obtained the deed as well as the instrument of assignment in writing hereinbefore set forth, both dated January 6, 1887, from William H. Colehour and wife, and which were acknowledged January 12th of the same year, without any consideration, or for a grossly inadequate consideration, and by the exercise of undue influence over the said William H. Colehour, and under such circumstances as renders them inequitable and unjust, as against the said William H. Colehour and his wife; and that the said Edward Roby had at that time notice of the conveyance made by the said William H. Colehour to Charles W. Colehour, dated May 1, 1879; and that he acquired by such deed or instrument of assignment no rights in equity as against the said William H. Colehour or the said Charles W. Colehour, and such deed and assignment are hereby declared null void. (Transcript of Record, 328.)

That on the 24th day of October, 1881, a bill in equity

was filed in the Circuit court of Cook county by the said Robert D. Clarke and others against the said William H. Colehour and others holding under him, together with the said Charles W. Colehour and Edward Roby to foreclose the mortgage for the purchase money remaining unpaid and that such proceedings were had in said cause; that a decree of foreclosure was rendered on the 17th day of July, 1886, requiring the payment of the amount thus found to be due and in default thereof ordering a sale of the premises remaining subject to said mortgage.

That said decree has since been affirmed on appeal in the Appellate court and Supreme court and under and by virtue of the directions of the same the premises described therein were sold on the 30th day of December, 1889, and the 29th day of January, 1890, to Charles E. Speer and others and that said premises were sold in separate lots and parcels, a description of which, together with the amounts for which the same are sold, are shown by "Exhibit A," attached to the original bill herein, and are hereinafter described and set forth as follows, to wit. (Transcript of Rec., 328):

MASTER'S FIRST SALE, DECEMBER 30, 1889.

The north half of south-east fractional quarter of section 17, township 37, north range 15, east third principal meridian, Cook county, Illinois, sold for $9,000.00.

The north-east fractional quarter of section 17, township 37, north range 15 east third principal meridian, Cook county.....	$30,000 00
All of block 46 in Ironworkers' Addition, sold to R. E. Jenkins.....	100 00
Also the following lots, all in Ironworkers' Addition:	
Lot 1, block 45.....	25 00
Lot 2, block 45.....	30 00

Lots 3, 4, 9, 10, 20, 21, block 45, sold to Jenkins, for each	31 00
Lots 5 to 8, 11 to 19, 22 to 103, block 45, each	30 00
Lots 104, block 45	42 00
Lot 1, block 44, Jenkins	50 00
Lots 2 and 3, block 44, Jenkins, each	41 00
Lots 4 to 52, block 44, each	40 00
Lot 53, block 44	50 00
Lots 4 to 14, block 43, each	40 00
Lots 1 to 3, block 43, each	30 00
Lots 32, 33, block 43, each	20 00
Lots 34, 35, block 43, each	25 00
Lots 5 to 16, block 42, each	40 00
Lots 2 to 4, block 42, each	41 00
Lot 1, block 42	51 00
Lots 33 to 48, block 42, each	40 00
Lots 1 to 16, block 41, each	30 00
Lots 33 to 48, block 41, each	30 00
Lots 1 to 16, block 40, each	30 00
Lots 33 to 48, block 40, each	30 00
Lots 41 to 47, block 38, each	75 00
Lot 48, block 38	100 00
Lots 1 to 23, block 36, each	100 00
Lot 24, block 36	125 00
Lots 6, 13, 20, 21, 22, block 35, each	200 00
Lots 7, 18, to 24, block 34, each	200 00
Lot 25, block 34	201 00
Lots 26 to 32 and 39, block 34, each	200 00
Lots 18 to 23 and 26 to 29 and 47, block 33, each	200 00
Lots 24, 25, block 33, each	225 00
Lot 7, block 33	20 00

Lot 25, block 32	250 00
Lots 26 to 30, block 32, each	200 00
Lot 25, block 31	250 00
Lots 26 to 47, block 31, each	200 00
Lot 48, block 31	225 00
Lots 27 to 34, block 30, each	200 00
Lots 5 to 7, block 28, each	200 00
Lots 26 to 28, 38, 39, block 27, each	200 00
Lots 34 to 46, block 26, each	100 00
Lot 47, block 26	101 00
Lot 48, block 26	126 00
Lots 18 to 23, block 26, each	75 00
Lots 24, 25, block 26, each	125 00
Lots 26 to 33, block 26, each	100 00
Lot 1, block 26, Cronholm	101 00
Lot 2, block 26	76 00
Lots 3 to 15, block 26, each	75 00
Lot 1, block 24	100 00
Lots 2 to 23, block 24, each	75 00
Lots 24, 25, block 24, each	100 00
Lots 26 to 47, block 24, each	75 00
Lots 21, 22, 23, block 23, each	50 00
Lot 48, block 24	85 00
Lot 24 to 40, block 23, each	75 00
Lot 1, block 23	75 00
Lots 2 to 20, block 23, each	50 00
Lots 1, 2, 3, block 22, each	33 33
Lots 4 to 25, block 22, each	40 00
Lots 26 to 29, block 22, each	30 00
Lots 30, 31, block 22, each	25 00
Lots 32 to 55, block 22, each	30 00
Lots 9, 10, 11, block 20, each	50 00

Except that part of said last three lots hereto-

fore conveyed to the Michigan Southern Railway Company.

Lots 12, 13, block 20, each	50 00
Lot 14, block 20	75 00
Lots 15 to 18 and 20 to 27, block 20, each	50 00
Lot 19, block 20	60 00
Lot 28, block 20	35 00
Lots 29, 30, block 20, each	25 00
Lot 1, block 19	60 00
Lots 2 to 6, block 19, each	40 00
Lot 7, block 19	41 00
Lot 8, block 19, (both to Oscar Remmer)	26 00
Lot 9, block 19	25 00
Lots 10 to 16, block 19, each	30 00
Lot 17, block 19, to Remmer	31 00
Lot 18, block 19	30 00
Lots 19 to 31, block 19, each	40 00
Lots 22 to 24, block 18, each	20 00
Lot 25, block 18	50 00
Lots 26 to 31, block 18, each	40 00
Lots 32, 33, block 18, each	30 00
Lots 35, 36, block 17, each	75 00
Lots 6 to 16 and 18 to 47, block 15, each	100 00
Lot 48, block 15	125 00
Lot 47, block 12	200 00
Lot 48, block 12	225 00
Lot 44, block 11	200 00
All of the south one hundred and thirty-five and forty-seven one hundredths ($135\frac{47}{100}$) feet of blocks 9, sold to Speer, for	3,800 00
Lot 4, block 3	175 00
Lots 10, 11, 12, block 2, each	125 00
Lot 1, block 1	75 00

Lots 2, 3, 4, block 1, each	60 00
Lots 5, 8 to 14, block 1, each	60 00
Lots 6, 7, 15, 16, block 1, each	50 00
Lots 17, 18, block 1, each	40 00
All the right, title and interest of William H. Colehour, in all the streets and alleys of Ironworkers' Addition also in the strip of land marked on the plat of Ironworkers' Addition as "Private property reserved for railroad purposes," sold for	2,000 00
Lots 22, 28, 29, 30, 15, 16, 17, 18, 19, 20, 21, block 43, each	40 00
Lots 23, 24, block 43, each	30 00
Lots 25, 31, block 43, each	50 00
Lots 26, 27, block 43, each	40 00
Lots 28 to 32, block 42, each	40 00
Lots 17 to 23, block 42, each	40 00
Lots 24, 25, block 42, each	50 00
Lots 26, 27, block 42, each	40 00
Lots 17 to 23, each, block 41	40 00
Lots 28 to 32, block 41, each	40 00
Lots 24, 25, block 41, each	50 00
Lots 26, 27, block 41, each	40 00
Lots 28, 29, 30, block 40, each	40 00
Lots 17 to 23, 26, 27, 31, 32, block 40, each	40 00
Lots 24, 25, block 40, each	50 00
Lots 1 to 23, block 39, each	40 00
Lots 24, 25, block 39, each	75 00
Lots 26 to 47, block 39, each	50 00
Lot 48, block 39	75 00
Lots 29 to 40, block 38, each	75 00
Lots 18 to 23, 26, 27, 28, block 38, each	75 00
Lots 24, 25, block 38, each	85 00

Lots 5 to 17, block 38, each	75 00
Lots 25 to 46, block 36, each	200 00
Lots 44, 45, 26 to 30, 35, 42, 43, block 35, each	200 00
Lot 25, block 35	250 00
Lots 42 to 44, block 34, each	200 00
Lot 8, block 33,	200 00
Lots 40, 41, block 33 each	200 00
Lots 40 to 42, 44 to 47, block 32, each	200 00
Lot 48, block 32	250 00
Lots 10, 11, block 32 each	200 00
Lots 31 to 35, 38, 39, block 32, each	200 00
Lots 16 to 23, 2 to 6, block 31, each	200 00
Lots 24 and 1, block 31, each	250 00
Lots 7 to 11, 14, 15, block 31, each,	200 00
Lots 45 to 48, 20, 25, 26, 8, 18, 19, block 30, each	200 00
Lots 21, 22, block 29, each	200 00
Lots 30, 31, 32, block 27, each	200 00
Lots 15 to 23, block 27, each	150 00
Lots 1, 24, 29, block 27, each	200 00
Lots 2, 3, block 27, each	150 00
Lots 4 to 14, block 27, each	125 00
Lots 16 to 23, 27 to 33, 38 to 48, and 26, block 25, each	75 00
Lots 24, 25, block 25, each	100 00
Lots 3 to 15, block 25, each	75 00
Lots 8 to 15 and 17 to 21, block 18, each	50 00
Lot 16, block 18, each	25 00
Lots 41, 30 to 34, block 17, each	75 00

SECOND SALE, JANUARY 29, 1890.

Lots 35 to 40, 19 to 23, 26 to 29, 7 to 18, block 17, each	50 00
Lots 23 and 24, block 17, each	100 00
Lots 46 to 48, 35 to 39, 40 to 45, 22, 26 to 34, all inclusive, 7, 8, 10 to 17, inclusive, 20, 21, block 16, each	75 00
Lot 25, block 16	100 00
Lots 40, 41, block 11, each	200 00
Lots 5 to 9, 14, 28 to 46, block 10, each	200 00
Lot 1, block 6	1 00
Lots 2 to 4, 7 to 11, block 5, each	150 00
Lots 10, 11, 12, block 4, each	150 00
Lots 4 to 9, 13, 14, block 2, each	75 00
Lot 13, block 10	100 00
Lot 12, block 10, released	1 00
Lot 43, block 27	200 00
Lots 18, 19, block 16, each	40 00
Lots 15 to 17, block 33, each	100 00
Lots 5 to 7, block 29, each	200 00
Lot 8, block 29	150 00
Lots 40, 41, block 34, each	200 00
Lots 9, 10, 11, block 30, each	100 00
Lot 16, block 26	75 00
Lots 34 to 37, block 25, each	75 00
All the premises in the north half of said section 8, township 37 north, range 15, commencing at a point where the center of the said fractional section 8, dividing the north half of said section from the south half thereof intersects the center of the right of way of the Lake Shore and the Michigan	

Southern Railway Company; thence on a course at right angles with said right of way, to the water's edge of the shore of Lake Michigan; thence southerly along the lake shore, close to the water's edge, to a point where the said center line of said section 8 intersects Lake Michigan; and thence west along said center line to the place of beginning, except such portion thereof as has heretofore been deeded by the said William H. Colehour to the Baltimore, Ohio and Chicago Railroad Company for the right of way, sold for..... 11,059 59

Lots 1 to 7, 31, block 20, for each $50, except such parts of said last eight lots as have heretofore been deeded by the said William H. Colehour to the Baltimore, Ohio and Chicago Railroad Company, lot one (1), block 21, sold for..... 7,909 14

Lots 2 to 46, block 21, sold for each..... 100 00

lots 47 to 90, block 21, " " " 50 00

except such parts of said lots as have heretofore been deeded by the said William H. Colehour to the Baltimore, Ohio and Chicago Railroad.

Lots 17, 33, block 34, each..... 200 00

Lots 34, 35, block 34, each..... 100 00

Lot 35, block 28..... 200 00

Lot 17, block 30..... 100 00

Lot 16, block 30..... 200 00

Lots 37 to 44, block 30, each..... 100 00

Lots 35, 36, block 30, each..... 100 00

Lot 10, block 11..... 200 00

Lots 4 to 7, block 18, each.....	50 00
Lots 15 to 23, block 2, each.....	100 00
Lots 14, 15, block 30, each.....	200 00
Lot 5, block 35	200 00
Lot 9, block 16.....	100 00
Lot 21, block 10.....	200 00
Lot 17, block 26.....	75 00
Lots 21, 22, block 30.....	50 00
Lot 16, block 12.....	200 00

The following are the lots and lands which, at the date of entering of this decree, belong to the trust estate created under the declaration of trust hereinabove set forth.

The north half (½) of the south-east fractional quarter (¼) of section seventeen (17), in town thirty-seven (37) north, range fifteen (15) east, third principal meridian, in Cook county, Illinois.

The north-east fractional quarter (¼) of section seventeen (17), in town thirty-seven (37) north, range fifteen (15) east, third (3rd) principal meridian, in Cook county, Illinois.

All of block 46, in Ironworkers' Addition to South Chicago, being a subdivision of the south fractional half (½) of section eight (8), in town thirty-seven (37), north, range fifteen (15) east of the third (3rd) principal meridian, in Cook county, Illinois.

The following described lots and premises are situate in said Ironworkers' Addition, a subdivision of the south half (½) of section eight (8), town thirty-seven (37), north, range fifteen (15), east third (3rd) principal meridian, Cook county, Illinois:

Lots 1 to 104, inclusive, in block 45; lots 1 to 53, inclusive, in block 44; lots 1 to 14 and 32 to 35, inclusive,

in block 43; lots 1 to 16 and 33 to 48, inclusive, in block 42; lots 1 to 16 and 33 to 48, inclusive, in block 41; lots 1 to 16 and 33 to 48, inclusive, in block 40; lots 41 to 48, inclusive, in block 38; lots 1 to 24, inclusive, in block 36; lots 6, 13, 20, 21, 22 in block 35; lots 7 and 18 to 32, inclusive, and 39 in block 34; lots 18 to 29, inclusive, and 7 and 47, in block 33; lots 25 to 30, inclusive, in block 32; lots 25 to 48, inclusive, in block 31; lots 33, 34 and 27 to 32, inclusive, in block 30; lots 5 to 7, inclusive, in block 28; lots 26, 27, 28, 38, 39 in block 27; lots 1 to 15 and 18 to 48, inclusive, in block 26; lots 1 to 48, inclusive, in block 24; lots 1 to 40, inclusive, in block 23; lots 1 to 55, inclusive, in block 22; lot 9 in block 20, except that part thereof heretofore conveyed by William H. Colehour to the Lake Shore and Michigan Southern Railway Company; lot 10 in block 20, except that part conveyed as in lot 9, last above described; lot 11 in block 20, except that part conveyed as in lot 9 above described; lots 12 to 30, inclusive, in block 20; lots 1 to 31, inclusive, in block 19; lots 22 to 33, inclusive, in block 18; lots 35 to 36, in block 17; lots 6 to 48, inclusive, in block 15; lots 47 to 48, in block 12; lot 44 in block 11.

All of the south one hundred and thirty-five and forty-seven one hundredths ($135\frac{47}{100}$) feet of block 9.

Lot 4 in block 3; lot 10 in block 2; lot 11 in block 2; lot 12 in block 2; lots 1 to 18, inclusive, in block 1.

All the right, title and interest of William H. Colehour, Charles W. Colehour and Edward Roby in all streets and alleys in said Ironworkers' Addition aforesaid, and in the strip of land marked on the plat of said Ironworkers' Addition as "private property reserved for railroad purposes."

Lots 15 to 22, inclusive, and 24, 28, 29, 30, 31, 23, 25,

26 and 27, in block 43; lots 28 to 32, inclusive, in block 42; lots 17 to 27, inclusive, in block 42; lots 17 to 27, inclnsive, in block 41; lots 28 to 32, inclusive, in block 41; lots 17 to 32, inclusive, in block 40; lots 1 to 48, inclusive, in block 39; lots 5 to 29, inclusive, and lot 40 in block 38; lots 25 to 46, inclusive, in block 36, lots 25 to 30, inclusive, in block 35; lots 35, 42, 43, 44, 45 in block 35; lots 42, 43, 44, in block 34; lots 8, 40, 41, in block 33; lots 10, 11 and 25 to 31 to 35, inclusive, in block 32; lots 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47 and 48 in block 32; lots 1 to 11 and 18 to 24, inclusive, in block 31; lots 14 and 15 in block 31; lots 8, 18, 19, 25, 26, 45, 46, 47, 48 in block 30; lots 21, 22 in block 29; lots 30, 31, 32, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 29 in block 27; lots 1 to 14, inclusive, in block 27; lots 3 to 33 and 38 to 48, inclusive, in block 25; lots 17 to 21 and 8 to 16, inclusive, in block 18; lots 30 to 34, inclusive, and 41 in block 17.

SECOND SALE, JANUARY 29, 1890.

Lots 37 to 40, inclusive, in block 17; lots 19, 20, 23, 24, 25, 26, in block 17; lots 28, 27, 29, 7 to 18, inclusive, in block 17; lots 7, 8, lots 26 to 34, lots 35 to 45, lots 46 to 48, lot 22, lots 10 to 17, 20, 21 and 25, inclusive, in block 16; lots 40 and 41, in block 11; lots 5 to 9, inclusive, in block 10; lots 38 to 46, inclusive, and 14, in block 10; lots 2, 3, 4 to 11, inclusive, in block 5; lots 10, 11, 12, in block 4; lots 4 to 9, inclusive, 13, 14, in block 2; lots 13, 12, in block 10; lot 43, in block 27; lots 5, 6, 7, 8, in block 29; lot 13, in block 30; lots 34, 35, 36, 37, in block 25.

All of the following land as follows, to wit:

Commencing at a point where the center line of said fractional section eight (8), dividing the north half (½) of said section eight (8) from the south half (½) thereof, intersects the center of the right of way of the Lake Shore and Michigan Southern Railway Company; thence in a course at right angles with said right of way to the water's edge on the shore of Lake Michigan; thence along the shore of Lake Michigan, in a southerly direction at the water's edge, to a point where the said center line of said section eight (8) intersects Lake Michigan, and thence west along said center line to the place of beginning, all in section eight (8), township thirty-seven (37) north, range fifteen (15) east third (3d) principal meridian, in said Cook county, Illinois.

Lots 1, 2, 3, 4, 5, 6, 7, 31, in block 20, except such portions of said lots 1 to 7 and 31, in block 28, as have been deeded by William H. Colehour to the Baltimore and Ohio Railway Company for right of way.

Lots 1 to 46, inclusive, in block 21; lots 47 to 90, inclusive, in block 21, except such portions of said lots as have been deeded by William H. Colehour to the Baltimore and Ohio Railway Company for right of way.

Lots 7, 17, 35, in block 34; lot 35, in block 28; lot 17, in block 30; lots 4, 5, 6, 7, in block 18; lots 15 to 23, in block 2; lot 5, in block 35; lot 9, in block 16.

That the following lots and lands have been heretofore sold by William H. Colehour to *bona fide* purchasers, and that these lots have been also sold by the master in the Clarke foreclosure sale, and that it is the duty of the receiver in this case to pay the said amounts for which said lots were sold by said master, together with interest accrued thereon, and have the same canceled of record.

Upon payment to the receiver any sum of money due

on said lots and yet unpaid, together with interest thereon, as well as all taxes and assessments on such lots with interest thereon, the receiver shall convey the land to the purchasers entitled thereto.

The lots and lands described below belong to purchasers for value from William H. Colehour, and are still subject to the amounts for which sold by the master in the case of *Clarke et al.* v. *Colehour et al.*

Lot 34, block 30; lot 43, block 27; lots 15, 16 and 17, block 34; lots 9, 10, 11, block 30; lot 17, block 34; lot 35, block 18; lot 17, block 30; lot 16, block 30; lots 35 to 46, block 30; lots 14, 15, block 30; lot 17, block 26; lots 22, 21 and 20, block 30; lot 16, block 12; lots 33 and 34, block 17; lot 7, block 33; lots 15, 16, 17, block 33; lots 18, 19, block 10; lot 10, block 11; lot 21, block 10; lot 47, block 13. (Trans. of Rec. 338–344.)

The court further finds that no title was conveyed by the deed of George F. Harding, of lots 9, 10 and 11, in block 30 of Ironworkers' Addition to South Chicago; which deed was procured by the said Edward Roby, as a part of the consideration for the deeds by William H. Colehour to him in the month of January, 1887; but that title to said lots had been conveyed to George W. Snyder by the deed of William H. Colehour, dated on the twenty-second day of August, 1874, and recorded on the 9th day of November, 1878, in book 856, of records, page 1, and he conveyed the same to Carrie M. Colehour, by a deed dated the 16th day of November, A. D. 1888.

That no title was conveyed by the deed executed and delivered by said Edward Roby to Carrie Stirmel Colehour, to lots 1, 2, 3, 4, 5, 6, 7, 8, 9 and 10, in block 36, of said Ironworkers' Addition of lot 8, in block 30, of

said Ironworkers' Addition; said property belonging to the trust estate hereinbefore mentioned, and that lot 37, in the subdivision of lot 1, in block 7, of said Ironworkers' Addition, conveyed by D. M. Hillis to Lucy Lender, and by Lucy Lender to the said Carrie Stirmel Colehour, procured by the said Edward Roby, belonged to the trust estate vested in David M. Hillis, as trustee, and that said Hillis charged said Roby four hundred dollars, as paid to him out of said trust fund on conveyance of said lot to said Lucy Lender, and that the said William H. Colehour should account for the money he received on the sale of said lot or its value in the accounting hereafter to be had;

And that whatever titles said Roby has so acquired he holds in trust for the benefit of said Colehours, and himself; that Richard D. Lender, on the 26th day of November, 1886, who then held the title to the following described lots and lands, situated in Cook county, Illinois, and being part of said trust estate, to wit: Lot five (5), in block three (3), lots eleven (11) and twelve (12) and twenty-eight (28) to forty-two (42), inclusive, in block ten (10); lot four (4), in block sixteen (16); lot six (6), in block seventeen (17); lots one (1) to twenty (20), inclusive, in block twenty-three (23); lots twenty-nine (29) to thirty-seven (37), inclusive, in block twenty-seven (27); lots twenty-seven (27) to thirty-two (32), inclusive, in block thirty (30); lots ten (10) and eleven (11) in block thirty-two (32) and lots two (2) to six (6), inclusive, in block thirty-four (34), in Ironworkers' Addition to South Chicago, a subdivision of the south-half (½) of section eight (8) in township thirty-seven (37), north; range fifteen (15), east of the third (3d) principal meridian; also, the land bounded as follows: begin-

ning at a point one hundred (100) feet north of the north line of 103d street on the west line of Avenue L, if the same were extended north of 103d street, and running thence west one hundred and twenty-five (125) feet on a line at right angles with the west line of said Avenue L, if extended north at right angles with 103d street, thirty-five (35) feet to the south line of the land described in a deed to E. Gulick, recorded August 18, 1873, thence east along the south line of said land one hundred and twenty-five (125) feet to the west line of Avenue L, if extended, and thence along such line, thirty-five (35) feet to the place of beginning, in trust for the said Charles W. and William H. Colehour and Edward Roby, made, executed, acknowledged and delivered to Edward Roby, a deed of the same;

That said Roby, at the time he received said deed, knew that said last described land was so held in trust by said Lender, and that said Roby now holds the title to the same, in trust for himself and said Colehours.

That the only judgments under which sales were made of any of the trust property in this case at issue were the McCoy, for the use of Frank W. Harding, *vs.* C. W. Colehour; Oliver H. Horton, receiver of German Savings Bank, *vs.* Charles W. or William H. Colehour; and the Crane Bros. Manufacturing Company *vs.* Charles W. and William H. Colehour; and that all the land and lots sold under any and all such judgments passed to said Edward Roby, and the titles were in said Roby at the filing of the bill in this case.

That said Roby holds said judgment titles as trustee for himself, Charles W. Colehour and William H. Colehour.

That the deed of May 1, 1879, of William H. to

Charles W. Colehour, and acknowledged by William H. on May 1, 1879, recorded in book 2,389, page 365, in and by which all of the property therein described was conveyed to Charles W., to hold under declaration of trust, and which deed is set out hereinabove in full, is binding and in full force between the parties hereto, and makes Charles W. Colehour the trustee of all the trust property involved in this suit, in the place and stead of William H. Colehour.

That Charles W. Colehour is the owner of, and is entitled to, the one-half (½), William H. Colehour to the one-quarter (¼), and Edward Roby to the one-quarter (¼), interest, according to the terms as set forth in said declaration of trust, of all said trust estate. (Transcript of Record, 344.)

That the land known as the Silicon land hereinabove described was recovered from Egbert Gulick, President of said company, by the joint co-operation, money and labor of the said Colehours and Roby; but the court makes no finding in regard to the ownership of said land in this decree.

That the land deeded by William H. Colehour to Jared Myers Clarke, July 2, 1877, and which is fully described hereinabove, belongs to the trust estate, created under said declaration of trust: That subsequently and on or about July 2, 1877, the said Jared Myers Clarke did execute a deed conveying said premises above described to William H. Colehour, and that subsequently thereto the said deed last named was changed by erasing the name of William H. Colehour and inserting the name of Anna P. Colehour as grantee therein, and at or about the same date the said Clarke did execute an instrument of writing purporting to be a deed (but to which there was no seal)

conveying said last described premises to Mabelle Colehour, then an infant of about ten years of age, and acknowledged the same in due form, and the said Mabelle after her majority did execute a deed of the same premises to Charles W. Colehour; and that said Charles W. Colehour holds whatever interest he acquired by said deed in trust for himself, said Roby and William H. Colehour. That the land deeded by William H. Colehour to Jacob Brèmer belongs to the trust estate created under said declaration of trust.

That the land deeded to Richard D. Lender by William H. Colehour, and fully set out hereinabove, belongs to the trust estate as created under said declaration of trust.

That any lots or lands shown to be held in trust for the trust estate, and which lots and lands are now mortgaged to secure any indebtedness, excepting the Clarke indebtedness as shown by the master's certificates, are all ordered by this court to be deeded by the parties to this suit where such parties hold or control the titles thereto, to the receiver in this decree named, and the court reserves the right to make such further order and decree in reference to the proceeds of all such lands and lots upon the hearing of the final account between the parties to this suit.

That the land mentioned in the said deed of May 1, 1879, from William H. Colehour to Charles W. Colehour, and described as follows, to wit: The west one-half (½) of the north-west one-quarter (¼) of section seventeen (17), township thirty-seven (37) north, range fifteen (15) east, third (3d) principal meridian, is not considered in this decree, and no findings are made by the court concerning the same.

That Edward Roby filed his petition in bankruptcy in

the United States District court on August 31, 1878, and was duly discharged on the 23d day of November, A. D. 1880; that he purchased from Bradford Hancock, said Roby's assignee in bankruptcy, at a sale on the 21st day of January, A. D. 1882, the following:

" The interest derived by declaration of trust in all the north three-fourths (¾) of east fractional half (½) of section seventeen (17); also south half (½) of section eight (8), and part of the north half (½) of section eight (8), lying east of a line drawn from the intersections of the north line of said south half (½) and Lake Shore and Michigan Southern Railroad at right angles to th e line of said railroad, to Lake Michigan, excepting said Michigan Southern and the Pittsburg, Fort Wayne and Chicago Railroad lands, in township thirty-seven (37) north, of range fifteen (15) east of third (3d) principal meridian, for the sum of four dollars ($4.00).

All the foregoing property is situated in the county of Cook and State of Illinois."

Which interest was described in schedule B to the petition in bankruptcy of said Roby, as follows:

" In the matter of Edward Roby, bankrupt.

" Property in reversion remainder or expectancy, including property held in trust for him, or subject to any power or right to dispose of or to change."

The interest derived by declaration of trust in 406 acres of land in sections 8 and 17, T. 37, R. 15, Cook county, Illinois, executed by William H. Colehour to William Hansbrough, July 31, 1871, which interest was assigned to Charles W. Colehour and Edward Roby, in consideration of $19,066,47, October 18, 1873. Said declaration of trust is in the following words:

"CHICAGO, Ill., July 31, 1871.

"KNOW ALL MEN BY THESE PRESENTS, that the 406 acres this day bought of H. F. Clark, by me in my name, is one-half the property of William Hansbrough, he having bought the one-half and paid the one-half of the cost payment, to wit: $5,000, and as the same is sold he to have one-half the profits.

WILLIAM H. COLEHOUR."

Said interest is further established to be one-fourth the net profits, and all the advances made by me on account of said land, by declaration of said William H. Colehour, given subsequent to the above assignment.

Said land is particularly described in a deed from Henry F. Clark, Robert D., Harriet S. and Sarah J. Clark to said William H. Colehour, dated July 18, 1871, and recorded in Cook county, Illinois, and embraces all the N. ¾ of E. frl. ½ of section 17, also all S. ½ Sec. 8, and part of N. ½ Sec. 8, lying East of a line drawn from the intersection of North line of said S. ½ with the Lake Shore and M. S. R. R., at right angles to the line of said R. R., to Lake Michigan, excepting said M. S. and the P. F. W. & C. Railroad lands. Said lands have in part been subdivided by the name of Ironworkers' Addition to South Chicago, and sales have been made therein by said William H. and Charles W. Colehour, as appear by the records, to an amount exceeding $233,000, most of the proceeds of which have been received by Charles W. Colehour, and the interest of your petitioner in said proceeds and in the lands remaining, which amount to about 240 acres, or 2,400 lots, your petitioner believes to be over $153,000.

EDWARD ROBY,

Petitioner.

(Transcript of Record, p. 349.)

That Charles W. Colehour holds certain deeds to parts of said land, which have not been recorded, and which are necessary to perfect the title to the lands covered by them, and holds the title to portions of the same, and the court finds that the titles to any portions of said land held or controlled by said Charles W. Colehour are held in trust for himself, said Roby and William H. Colehour.

That the said land is subject to tax liens, and the certificates of sale issued by said master; that the differences between said Colehours and said Roby are such that they can only be determined and settled in a court of equity; that said land is now worth, above said liens, not less than $200,000, and that in order to preserve said property and prevent the interest of said parties therein from being cut off for want of ability to redeem the same from said liens, it is necessary that a receiver be appointed, with power to sell sufficient of said lots and lands to pay and discharge said liens and the debts against said land, and that in order to enable him so to do, the said Roby and the said Colehours should, as soon as possible, by good and sufficient deeds, convey to such receiver the title and interest of all and each of them in said land.

That certain moneys have been paid by said Roby and said Colehours in the furtherance of said joint adventure, concerning the merits of which this court cannot, on the evidence now before it, decide; and that an accounting will therefore be had for the purpose of determining how much, if anything, may be due to either of said parties; and the court leaves for further consideration all questions relating to said accounting.

The alleged verbal settlement of 1879 is not sustained by the evidence, and will be disregarded as a settlement.

The court finds that said Roby was not guilty of any

actual or intentional fraud; and that the gross charges of fraud, among which are the charges as to his having stolen the declaration of trust from its place of deposit, that the deed of William H. Colehour to him was a forgery, and that he offered to betray his client, Clark, in 1873 are not proven by the evidence in the case.

This court, therefore, hereby orders, adjudges and decrees that The Title Guarantee and Trust Company be and is hereby appointed to be a receiver of said property; that said Edward Roby, within ten days from its qualification as such, by a good and sufficient deed, convey to said receiver all the titles to said lots and lands which have, as before found, been deeded to him, and also all of his right, title and interest in and to the lands and lots hereinbefore described, belonging to said trust estate.

That said Charles W. Colehour, within ten days from this date, by good and sufficient deed, or deeds, convey to said receiver, the said titles he has acquired, and file for record all the deeds he has under his control, affecting the title to any part of said land; and also within that time deed to said receiver all his right, title and interest in said lots and lands included in said trust estate where such lots or lands belong to said trust estate; and that William H. Colehour, within that said time, also, by good and sufficient deed convey all his right, title and interest in said land included in said trust estate, to said receiver.

And the court further orders and decrees that said receiver, before he enters upon the discharge of his duties, make, execute and deliver to this court a bond with good and sufficient securities, in penal sum of one hundred thousand dollars ($100,000), conditioned for the faithful performance of his duties as such receiver.

The court further orders and decrees that said Roby

and the said Colehours, each of them, immediately deliver to said receiver all abstracts of title of said lands, or any part thereof, in the possession and control of either of them, and that they and each of them in all reasonable ways aid said receiver in perfecting the title to said lands and getting the same ready for market.

The court further orders and decrees that in case said Roby, or either of said Colehours, shall fail within ten days from the date of the approval of the bond and qualification of such receiver, to make, execute and deliver the deeds heretofore ordered to be made, and delivered to said receiver, then George Bass, master of this court, shall make, execute and deliver to said receiver good and sufficient deed or deeds, conveying the title and interest of the one or more refusing or neglecting to make such deed to said receiver.

The court further orders and decrees that said receiver, with all convenient speed, proceed to properly advertise said lands and lots for sale, either at public auction or private sale, and to sell sufficient of the same to pay and discharge said debts and liens, and if necessary so to do, in order to perfect the title to said lots and lands, pay and discharge a certain judgment of about fifteen hundred dollars ($1,500), rendered against Charles W. Colehour and others in favor of Loviza Thunman. Said receiver shall have full power to make all necessary deeds and conveyances; he may sell for all cash or part cash, and balance on time, with secured notes on such time as may be customary in the real estate markets; he shall report the sales he may make to this court for its approval, and give at least one day's notice of the application for approval to the said Roby and Colehours, by leaving notice at the office of said Roby and at the office of the solicitors of said Colehours.

It is further ordered that this cause be referred to George Bass, Esq., a master in chancery of this court, to take the account of said trusts from the commencement thereof; that said William H. Colehour and Charles W. Colehour and Edward Roby forthwith produce and deposit with said master all books, accounts and memoranda touching the subject-matter of their said trusts, all receipts and vouchers for money or other property of the trust disposed of by them or either of them, and all documents and memoranda in their possession or power relating to the execution of their trusts.

It is also further ordered that the receiver report his proceedings in the premises to this court with all convenient speed.

The court reserves the right to make any further order herein concerning the accounting between the parties hereto, and further directs the master to act with reference to said accounting with all convenient speed, and to take the testimony therein and report the same to the court, together with his findings thereon.

The said bills in the cases of Roby *vs.* James E. Clark and C. W. Colehour; Roby *vs.* Jared M. Clarke; Roby *vs.* Charles W. Colehour, are and each of them is dismissed for want of equity.

The question as to costs is reserved for future decision.

Therefore, the said defendant, Edward Roby, prays and appeals to the Supreme court of the State of Illinois, which appeal is allowed upon the defendant, Edward Roby, filing a bond within twenty days in the penal sum of two hundred thousand dollars, with security to be approved by the court; and said bond shall contain the condition that the appellant shall prosecute his appeal with effect and, in case the said decree is affirmed, shall pay all

costs of this court, and abide by and perform such order and judgment as may be entered by the Supreme court on such appeal, and comply with any order entered in pursuance of the mandate of said Supreme court, and shall further pay all damages which may be suffered by the said Charles W. Colehour and William H. Colehour, or either of them, by reason of such appeal; and in ascertaining such damages the difference between the amount required to redeem the lands and lots hereinbefore described in this decree, and the amount which might be realized by a sale of said lands and lots respectively, by the receiver appointed by this decree shall be the rule for ascertaining such damages.

And sixty days from date is granted said Roby in which to prepare and file a certificate of evidence herein.

Errors Assigned.

In the Supreme court Edward Roby, plaintiff in error, assigned the following as errors:

"(1.) The Circuit court erred in granting relief to said Charles W. Colehour upon his bill.

(2.) The Circuit court erred in granting relief to said William H. Colehour upon his cross-bill.

(3.) The Circuit court ought to have dismissed said bill for want of equity.

(4.) The Circuit court ought to have dismissed said cross-bill for want of equity.

(5.) The Circuit court granted relief to said Colehours outside of the scope of either of said bills.

(6.) The Circuit court erred in appointing the Title Guarantee and Trust Company receiver.

(7.) The Circuit court erred in fixing the amount of

the receiver's bond; and also in refusing to require a larger bond; and in approving the receiver's bond.

(8.) The Circuit court ordered the receiver to pay a large sum, to wit: $4,350 on claims not described in any bill, and, for the benefit of persons nowhere named in the record.

(9.) The decree in this case is contrary to the law.

(10.) The decree is not sustained by the evidence.

(11.) The Circuit court erred in its findings of fact in the decree.

(12.) The Circuit court erred in its conclusions of law.

(13.) The Circuit court erred in finding against the existence of a judgment set up in the answer of plaintiff in error rendered June 4, 1878, in favor of McCoy *vs.* William H. Colehour for $3,700 and costs.

(14.) The said decree was in other respects improper and erroneous."

(Transcript record, 393.)

Opinion of Supreme Court.

Illinois Supreme Court, N. G. Division.

Opinion Filed November 26, 1890.

E. Roby *v.* C. W. Colehour.

Error to Cook County.

Per Curiam.—As we are disposed to concur substantially with the views expressed by the learned chancellor who heard this case in the court below, we shall content ourselves with considering briefly two or three propositions which are very earnestly pressed upon our attention by the counsel for the plaintiff in error in his argument here. The facts involved in the case are numerous and complicated, and the evidence is very voluminous, and as to almost every material matter, it is directly conflicting. We have given the record as thorough and exhaustive an examination as the time at our disposal has rendered possible, or as the questions argued here have seemed to demand. Upon such examination we have reached the conclusion that the construction placed upon the evidence by the chancellor, and the findings of fact made by him, are as favorable to the plaintiff in error as can be held to be fairly warranted by the record. Nor does the counsel for the plaintiff in error seem to very seriously controvert the facts as found by the chancellor, his argument being mainly directed to a refutation of the legal propositions announced by him in his opinion and an attempt to show that the rules of law thus adopted, either have no existence or no application to the case.

The evidence shows—and as to this there is no dispute—that at the time of the original purchase of the land in controversy from the Clarkes in 1871, and the convey-

ance of it to William H. Colehour, as trustee, Hansbrough, Morrill, Corby and Charles W. Colehour embarked in a joint enterprise, in which they undertook to purchase 406 acres of vacant land near the city of Chicago, with a view of subdividing and platting it into blocks, lots, streets, etc., and of otherwise improving it as suburban property, and of then selling it at a profit, the net profits to be divided between them in certain proportions then agreed upon. Morrill and Corby subsequently surrendered or abandoned their interest, and in 1873, the Hansbrough interest was, for a certain consideration, assigned and transferred to Roby, the plaintiff in error, and Charles W. Colehour, and by a declaration of trust then executed by William H. Colehour, it was provided that the net profits of said enterprise, after the payment of all incumbrances and all moneys advanced by either party, should be participated in by said parties in the following proportion, viz: one-half by Charles W. Colehour, one-fourth by Roby, and one-fourth by William H. Colehour. From that time manifestly these parties sustained the same relation to each other that existed between Hansbrough, Morrill, Corby and Charles W. Colehour in the original enterprise.

In *Morrill* v. *Colehour*, 82 Ill., 618, we had before us the declaration of trust executed by William H. Colehour to Morrill, Corby and Charles W. Colehour, providing for their joint participation in one-half of the net profits arising from the sale of said land, and we there held that the beneficiaries under that instrument took no interest in or title to the land itself, but that their interest was only in the profits, as to which their relation was that of partners. The declaration of trust between the parties in this case is, so far as this question is concerned, in

substantially the same terms, and must, therefore, receive the same interpretation, and it must be held, in effect, to establish between them the relation of partners, and to give them the rights and impose upon them the duties and disabilities incident to that relation.

We are of the opinion also that the evidence fully justified the court below in finding that Roby, from the time he acquired his interest in said joint enterprise up to a short time prior to the filing of the bill in this case, sustained in fact to the Colehours the relation of attorney and legal adviser, and that during a large portion of that time he was frequently in the office where the business of said trust or joint adventure was being carried on, examining the books and advising and consulting as to the business, and that the Colehours received and relied upon his legal advice in the matters in which they were jointly interested.

Counsel now takes the position, if we correctly understand him, that, admitting the facts to be as found by the court below, namely, that Roby was jointly interested as partner with the Colehours in the profits to be realized from the improvement and sale of said land, and also that he held the confidential relation to them of attorney and legal adviser, these facts constituted no obstacle to Roby's acquiring title to said land adverse to the Colehours, and that the court therefore erroneously held that, in obtaining title to said land through said sheriff's sales, he must be deemed to have purchased and to hold the legal title to the land as trustee for himself and the Colehours, subject only to the right to be re-imbursed for the moneys expended in making such purchases.

The doctrine of this subject is too well settled to make it our duty to follow counsel through his labored argu-

ment and his voluminous citation of authorities, or even justify us in so doing. The general principles universally recognized in matters of this character are well stated by Lord CHELMSFORD in *Tate* v. *Williamson*, L. R. 2 Chan. App. Cas., 55, as follows: "The jurisdiction exercised by courts of equity over the dealings of persons standing in certain fiduciary relations has always been regarded as one of a most salutary description. The principles applicable to the more familiar relations of this character have been long settled by many well-known decisions, but the courts have always been careful not to fetter this useful jurisdiction by defining the exact limits of its exercise. Whenever two persons stand in such a relation that while it continues, confidence is necessarily reposed by one, and the influence which naturally grows out of that confidence is abused, or the influence is exerted to obtain an advantage at the expense of the confiding party, the person availing himself of his position will not be permitted to retain the advantage, although the transaction could not have been impeached if no confidential relation had existed."

The relations to which these principles are applied are very numerous, and among those to which they are so applied by a substantial concurrence of all the authorities are those of attorney and client, trustee and *cestui que trust* principal and agent, partners and part owners of property. Willard's Eq. Juris., 170; 2 Pomeroy's Eq. Juris., Sec., 955, *et seq.*; 1 Story's Eq. Juris, Sec. 307, *et seq.*; Bispham's Eq., Sec. 231, and authorities cited in notes. Indeed, as said by Mr. Pomeroy, "It is settled by an overwhelming weight of authority, that the principle extends to every possible case in which a fiduciary relation exists in fact, in which there is confidence

reposed on one side, and the resulting superiority and influence on the other. The relation and the duties involved in it need not be legal; it may be moral, social, domestic or merely personal." 2 Pomeroy's Eq. Juris., Sec. 956.

In cases of partnerships, which usually involve also the relations of joint ownership, trust and agency, the utmost good faith is due from every member of the partnership toward every other member, and if any dispute arises between partners touching any transaction by which one seeks to benefit himself at the expense of the firm, he will be required to show, not only that he has the law on his side, but that his conduct will bear to be tried by the highest standard of honor. 1 Lindley on Partnership, 303; 1 Bates on Partnership, Sec. 303; Parsons on Partnership, 222. If one partner, therefore, buys an outstanding adverse title to property belonging to the firm, or acquires an interest in its property without his copartner's assent, which would be beneficial to the firm, the purchase will be deemed to be for the firm. 1 Bates on Partnership, Sec. 305.

The authorities in support of these rules are ample. Thus, in *Forrer* v. *Forrer's Executor*, 29 Grat., 134, certain partners bought a tract of land for partnership purposes and it was conveyed to them. After the death of one of them, it was ascertained that the title to one-third of the land was defective, and the surviving partner purchased this one-third interest and took a conveyance to himself. It was held that he purchased for the joint benefit of himself and the heirs of the deceased partner, and that they were entitled to claim it upon paying their shares of the expense of the purchase. The court say: "Whenever two or more persons having a community of interest hold an imperfect title, and one of them buys an

outstanding title, such purchase will inure to the common benefit, upon contribution made to repay the purchase money. The rule is based upon the community of interest in a common title, creating such a relation of trust and confidence between the parties that it would be inequitable to permit one of them to do anything to the prejudice of the other in reference to the common property." So, in *Lamar's Executor* v. *Hale*, 79 Va., 147, it was held that partners stand in the relation of mutual agents and trustees, and can, therefore, acquire the property of the firm only for the benefit of the firm. In *Kinsman* v. *Parkhurst*, 18 How., 289, the same principle was applied to a partnership between a patentee and another person, where the latter, after becoming a part owner of the patent and agreeing to conduct the business of manufacturing the patented machine on their joint account, set up, as against his copartner a right to manufacture said machine under a license from a third person. See, also, *Farmer* v. *Samuel*, 3 Dana, 187; *Eakin* v. *Shumaker*, 12 Texas, 51; *Gillett* v. *Gaffney*, 3 Colo., 351.

On the same principle it is held that if a partnership have a valuable leasehold property of which the lease is about to expire, a partner cannot, privately, either during the continuance of the partnership or before its assets have been sold, obtain a renewal of the lease for his own benefit, but will be held to have obtained it in trust for the firm. *Featherstonhaugh* v. *Fenwick*, 17 Vesey, 598; 1 Lindley on Partnership, 307, and authorities cited. In *Davis* v. *Hamlin*, 108 Ill., 39, this court applied the same principle in case of a confidential agent.

So far, then as this branch of the case is concerned, it would seem to be quite immaterial, whether, prior to

Roby's purchases of the titles acquired through the execution sales and sheriff's deeds, he agreed to make such purchases and hold the titles purchased for the benefit of himself and the Colehours, as Charles W. Colehour testifies, or whether he made such purchases entirely of his own accord, and for his own benefit, and without any consultation with his copartners, as his own testimony would seem to show. In either case the purchases must be deemed to have been made, and the titles purchased must be deemed to be held, for the benefit of the partnership, Roby, however, being entitled to be re-imbursed by the Colehours for three-fourths of the moneys expended by him in buying in said titles.

Nor is the trust thus created within the operation of the Statute of Frauds. It is not an express trust, but one arising by construction of law. One of the most ordinary forms of constructive trusts is that which grows out of the rule of law which forbids a trustee or other person who occupies a fiduciary or quasi-fiduciary relation from gaining any personal advantage touching the thing or subject as to which such relation exists. Bispham's Eq., Sec. 92.

Constructive trusts are expressly exempted from the operation of the Statute of Frauds. R. S. 1874, Chap. 59, 9.

We are of the opinion that the court below properly held the deed of January 6, 1887, from William H. Colehour and wife to Roby to be inoperative and void so far as the rights of Charles W. Colehour are concerned, for the reasons stated by Judge Tuley in his opinion.

We are also of the opinion that said court properly set aside and vacated said deed in accordance with the prayer of the cross-bill, on the ground of inadequacy of con-

sideration and undue influence. The inadequacy of consideration results from the evidence as a conclusion of fact, and after duly considering all the evidence bearing upon that question, we perceive no reason for holding that the court below was not fully warranted in drawing that conclusion. So far as the evidence of undue influence is concerned, the preponderance seems to be clearly in favor of William H. Colehour, and if the account of the transaction given by his witnesses is to be believed, the propriety of the decision of the court in this respect is manifest, especially when taken in connection with the fact, which as we have said the evidence in our opinion warranted the court in finding, that at the date of the said deed Roby was, and for several years prior thereto had been, Colehour's attorney and legal adviser.

It is not the doctrine of courts of equity that attorneys are, by their fiduciary position, wholly incapacitated to purchase from their clients, nor does such incapacity ordinarily exist in case of other fiduciary relations. The rule, however, is that the presumption is always against the validity of transactions of that character, and the burden is on the attorney to remove that presumption, by showing affirmatively the most perfect good faith, the absense of undue influence, a fair price, and knowledge, intention and freedom of action on the part of the client, and also that he gave his client full information and disinterested advice. *Jennings* v. *McConnell*, 17 Ill., 148; *Hess* v. *Voss*, 52 *ib*, 472; *Laclede Bank* v. *Keeler*, 109 *ib*, 385; *Morrison* v. *Smith*, 130 *ib*, 304; 2 Pomeroy Eq. Juris., Sec. 960; 1 Story's Eq. Juris., Sec. 311; Mechem on Agency, Secs. 877–879; Weeks on Attorneys, Sec. 268.

Tested by this rule, the transaction by which Roby ob-

tained from William H. Colehour a conveyance of the latter's interest in the land in question cannot be upheld. The preponderance of the evidence fails to show an absence of undue influence, but rather the contrary, nor does it establish a fair and adequate consideration. Even if we disregard all those misrepresentations charged in the bill and cross-bill as to which the evidence is conflicting, it is undisputed that Roby insisted then, as he does now, that by the execution sales the legal and equitable interests of both William H. Colehour and his brother had been extinguished or had been transferred to him, and that no title or interest remained in the Colehours, except, perhaps, their statutory right to redeem from the sale under the judgment in favor of the Crane Brothers Manufacturing Company which had not then expired and the inchoate right of dower in the wife of William H. Colehour. It is unquestionable that the advice then given by Roby to William H. Colehour and his wife was upon the basis of this assumption as to the rights of the parties. Roby admits, that at the negotiations, which resulted in the deed from William H. Colehour and wife to him, he produced and exhibited the sheriff's certificates and deeds evidencing his title under the execution sales, and claimed such title in himself as those instruments purported to convey, and there can be no question that his advice to Colehour and wife as well as the entire negotiation proceeded upon that basis. But this advice, as we have already seen, was wholly erroneous and misleading, as the only equitable right, as against the Colehours, acquired by Roby through the sheriff's sales was the right to be re-imbursed by the Colehours to the extent of three-fourths of the moneys expended by him in buying in those titles. In this he manifestly came far short of his legal

duty to exercise perfect good faith and to give his client full information and disinterested advice as to his rights.

Furthermore, the consideration was undoubtedly fixed and agreed upon by Roby and Colehour on the same basis, viz: that Roby had already acquired both the legal and equitable interests of the Colehours. It may be, if that had been the fact, that the consideration would have been adequate, but we think it clearly was not so, in view of the rights of the Colehours as they actually were.

We fail to find such evidence of subsequent acquiescence or ratification by William H. Colehour as should now be held to bar his right to have said deed rescinded and canceled. The evidence shows, it is true, that shortly after the deed was executed Colehour directed various tenants on the land to pay rent to Roby, informing them at the same time that he had conveyed all his interest to him; and it also appears that for some months thereafter he remained on friendly terms with Roby, and visited him frequently, both socially and on matters of business, and that during that time he made no attempt to repudiate said deed. It does not appear, however, so far as we are able to discover, that while this state of things existed Colehour was aware of the true nature and extent of his rights, or had ascertained that Roby, in buying in the titles acquired under the sheriff's deeds, was charged by construction of law, as trustee for himself and the Colehours, and that he held the titles thus purchased only in trust. Before William H. Colehour can be held to have validated his voidable deed, it must appear that, at the time of the alleged ratification, he had been made aware of the nature and extent of his actual rights, or at least that he had learned that the advice received by him from Roby was incorrect.

Nor does the evidence, in our opinion, charge Charles W. Colehour with such laches as should be held to bar his right to relief. According to his testimony, he supposed that Roby, in purchasing the titles under the execution sales, was doing so in the interest of himself and the Colehours, under an express arrangement by which he was to buy in those titles and hold them subject to the same trust upon which the land was originally held, by William H. Colehour. This express arrangement is denied by Roby, but if it was never entered into, still, as we have seen, the law, by construction, constituted Roby a trustee of a trust, the terms of which were of substantially the same character as that alleged by Colehour. It thus appears that in any view of the evidence Roby held the titles purchased by him in trust.

Now, it is not shown, at least by a preponderance of the evidence, that Colehour was made aware in any way that Roby was disposed to deny the trust relation and claim adversely to the Colehours until about the time of the sale under the Clarke foreclosure decree, and the present bill was filed in apt time thereafter.

Being of opinion that the decree of the court below is fully warranted by the pleadings and evidence, the judgment of this court will be that said decree be affirmed.

Decree affirmed.

(Transcript of Record, 2929–2939.)

Judgment of the Supreme court affirming the decree of the Circuit court. (Transcript of record, 2,940–2,943.)

An application was made for a rehearing which was denied. (Transcript of record, 2,949.)

CERTIFICATE OF CHIEF JUSTICE OF THE SUPREME COURT OF ILLINOIS.

Now comes the plaintiff in error, by General John M. Palmer, his counsel, and suggests to the judges of this court that he desires to remove the said consolidated causes into the Supreme court of the United States, and prays the judges of this court to certify the federal questions in conformity with the practice indicated by the decisions of the said Supreme court of the United States, and we being willing that the questions and decisions subject to review by said Supreme court may be made manifestly to appear of record, to the end that the rights of the said plaintiff in error to a review of the errors of this court upon matters subject to the jurisdiction of said Supreme court of the United States may be fully saved, do certify and order it to be entered of record in this court, to the end that it may be so certified to the said Supreme court of the United States.

That the said Edward Roby pleaded his petition in bankruptcy and adjudication, and assignment to his assignee in bankruptcy and his full discharge from all his debts existing at the time of filing his petition in the District court of the United States in and for the Northern District of Illinois, and insisted upon said proceedings and discharge as by its legal effect and operation discharging and releasing him from all obligations, liabilities, duties and trusts growing out of his interests in the lands or the profits arising from the sale thereof and from his relations as partner or jointly interested therein, but this court in considering the law and the facts of the cases, decided

against the rights and claims by the said Roby made under such proceedings and discharge so claimed, pleaded and insisted on by him, but on the contrary held and decided that such was not the legal effect and operation of such proceedings and discharge and that such proceedings and discharge did not operate in law or equity to discharge the said Roby from all his obligations, liabilities, duties and trusts with respect to and growing out of his interest in said lands and of his relations to said parties.

That said Roby further pleaded that he purchased all the interest in said lands and claims upon the proceeds thereof after his discharge aforesaid from Bradford Hancock, Esq., assignee in bandruptcy of him, said Roby and claimed and insisted that under and by virtue of the provisions of the laws of the United States he as such purchaser took such interest as a stranger free and clear from any duties or obligations or connections existing between said Roby prior to the date of his petition in bankruptcy, and said Wm. H. and Charles W. Colehour or either of them; and that the deed of May 1st, A. D. 1879, given by William H. Colehour to Charles W. Colehour and set forth *in haec verba* in the decree of the Circuit court was void as to said Bradford Hancock, assignee in bankruptcy of said Roby and as to him said Roby as purchaser from said assignee and that Charles W. Colehour took nothing by such deed, but this court decided against all the said claims so made by the said Roby and also decided that such deed was and is valid against said assignee in bankruptcy and against said Roby as purchaser from such assignee.

And the said Edward Roby also pleaded the petition in bankruptcy and adjudication of the said District court of

the United States for said Northern district of Illinois; that said Charles W. Colehour was bankrupt, and assignment to his assignee duly appointed by said court; and proved the same by exemplification of the records and proceedings of said District court, and by other evidence, and the discharge of said Charles W. Colehour from all his debts existing at the date of his said petition was also proved; and said Roby insisted that by the said proceedings and records, it was proved that he, said Charles W. Colehour, was divested of all his demands on the lands in his bill mentioned by reason of the power of attorney, and contract by him pleaded, and in the decree found, bearing date May 29, 1873, and also of all other interests in and claims upon the lands in said bill mentioned, or the profits thereof, and of all interests in common with the said William H. Colehour and Edward Roby, and either of them; and that the said Roby was by operation thereof exempted from all claims of the said Charles W. Colehour, and from his suit on account of said land and that the proper and necessary effect of such records and proceedings as proof was that said Roby was not chargeable to the said Charles W. Colehour in said suit by reason of community of interest or any other cause, but this court, in considering the law and facts of the cases, decided against the claims of the said Roby, so pleaded, claimed and insisted on, and decided that such was not the legal operation and effect of such proceedings; and that said Charles W. Colehour had a right to sue upon said instrument, dated May 29, 1873; that said deed, dated May 1, A. D. 1879, was and is valid as against said assignee in bankruptcy, and against said Roby as purchaser from said assignee, and gives said

Charles W. Colehour the right to defend the first three above entitled cases against said Roby, and to prosecute the fourth as against said Roby, and to claim and enforce all rights of partner, trustee and co-tenant against said assignee in bankruptcy of said Roby, and against said Roby as purchaser from such assignees.

(Signed) JOHN SCHOLFIELD,
Chief Justice Supreme Court of Illinois.

146 U.S. 15
987 vc.
APR 2
JAMES H. MCKEEN

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1891.

EDWARD ROBY

vs.

CHARLES W. COLEHOUR, WILLIAM H. COLEHOUR ET AL.

Error to the Supreme Court of Illinois.

OPINION JUDGE M. F. TULEY DELIVERED IN CIRCUIT COURT OF COOK COUNTY.

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(Signed) JOHN SCHOLFIELD,
Chief Justice Supreme Court of Illinois.

146 US 153

98 U.S.

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FILED.
APR 25 1892
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1891.

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From the evidence in this case it appears that in 1871 Henry F. Clarke deeded the land in controversy to William H. Colehour—the consideration being $100,000—of which $10,000 was paid in cash, a small mortgage of $4,000 assumed and purchase money given for $86,000.

William Hansbrough and Wesley Morrell and Francis Corby furnished the cash and were interested in the profits that might result from a resale of the property. The town of Colehour was projected and located in part upon this property, and large profits were expected from the resale of the property.

Morrell and Corby, in some way surrendered or abandoned their interest, how is immaterial. Hansbrough assigned a certain paper or declaration of trust made by W. H. Colehour—the holder of the legal title to Boone—and that interest—a one-half interest in the profits—was conveyed in 1873 to Charles W. Colehour, the complainant, and the defendant, Edward Roby, each taking one-half thereof.

Charles W. Colehour had been the chief manager in the original purchase, and had been acting under a power of attorney from William H. Colehour, who gave him a salary of $5,000 per year. About the time or shortly after the purchase from Hansbrough, a declaration of trust as to the interest of the said Charles W. Colehour, William H. Colehour and Edward Roby was made, and it was, that C. W. Colehour was entitled to one-half, W. H. Colehour one-fourth and Edward Roby to one-fourth of said land; or the net profits realized therefrom after the payment of the mortgages, costs of development and charges incident to the joint adventure. The intention and effect of the arrangement between the parties being that W. H. Colehour should be the only party liable for the mortgages, etc., and that the net profits should be shared in the proportion named.

A similar instrument, so far as the recitals go as to the interests of the parties—was given by W. H. Colehour, to Morrell and Corby, on the purchase of the land in 1871, and that has received a construction by our Supreme court in the case of *Morrell* v. *Corby*, in 82 Illinois Reports.

It was there held that Morrell and Corby had no interest in the land as such, but that the relation of the parties was that of partners or of persons who had joined

in a joint adventure or speculation; and that their only interest was in the net profits that might be realized.

Substantially the same view was taken in regard to this particular declaration of interests, in the foreclosure case brought in this court on the $86,000 mortgage, and which was appealed to and affirmed in the Supreme court, Illinois.

One of the strongly contested points in this case is, as to which is the actual agreement between the parties—*that* contained in a declaration of trust, dated August 16, 1873, produced by complainant— or *that*, without date, produced by Roby, both being signed by William H. Colehour, and both being made at, or shortly after the purchase from Hansbrough.

The two instruments do not differ as to ratio of interests of the three parties, or as to the character of such interests—but the one produced by complainant confirms and keeps in force the power of attorney to C. W. Colehour, heretofore given, while the Roby instrument is silent as to that.

The Colehour instrument also recites that the sole consideration for the interest of Roby was for services to be performed. No such provision is found in the Roby copy. There is a clause of forfeiture of interest, if attempt be made to acquire an interest in the land before it is paid for, contained in the Colehour and not in the Roby instrument.

Roby's recites as a consideration money paid by Roby for his interest, and prohibits any assignment by any of the parties of any interest without the written consent of the others. It also appoints Charles W. Colehour attorney in fact to sell and make deeds of the lands.

These provisions are not found in the Colehour instrument.

The evidence to my mind shows that the instrument produced by Roby was the one last drawn, that the minds of the parties did not agree upon the other, and, therefore, the Roby instrument was prepared and signed.

I am of the opinion that it was agreed to by all parties and delivered to Roby as containing the true declarations of the interest of the parties. It must be so treated and held.

It appears that a quitclaim deed was made September, 1876, by C. W. Colehour to William H. Colehour, of all his interest in the lands. No consent of Roby was given thereto. It also appears that in 1878 C. W. Colehour filed his petition in bankruptcy in the United States court in this district, and did not schedule the said land or any interest in the same, or the net profits aforesaid.

Roby, about the same time, went into bankruptcy and scheduled his interest, and bought the same back from his assignee for a nominal consideration.

On May 1, 1879, complainant contends that W. H. Colehour, with the knowledge and assent of all the parties, made a deed of the land, to be held subject to the original trust declaration made in 1879, which deed was not r ecorded until 1888.

Much evidence has been introduced to show that defendant, Roby, advised and insisted on such deed being made, and knew all the facts concerning its execution, upon the theory that if he did, he would be chargeable with notice thereof at the time of the execution of the deed of W. H. Colehour to him of the lands in question in 1887.

In my opinion it is not material to the rights of complainant that it be shown that Roby advised or knew of the execution of the deed or of its existence, but the finding may be made, if deemed by complainant's counsel necessary to insert such in the decree—that the evidence shows such deed was executed and delivered at or prior to the date of the acknowledgment thereto attached, and that Roby knew of the existence of the deed and the claims thereunder, before the execution of the deed of W. H. Colehour, made to him in that year, 1887.

It appears that complainant gave very considerable time and attention to selling lots in the subdivision made of the land, and the making of the necessary street improvements for a number of years, at least until 1878, when the holders of the Clark mortgage ceased (as they had before been doing) to release lots that could be sold from the mortgage.

In 1880, Charles W. Colehour was absent from the land, and from Chicago, a large portion of the year, and the same was true of the years 1881 and 1882. In 1881, the Clarks commenced their foreclosure proceedings, making the Colehours, Roby and other parties in interest, defendants.

A decree of sale for over $145,000 was entered, which went to the Supreme court and was affirmed. The land was sold according to the subdivisions by the lot, in the month of December, 1889, and in the month of January, 1890.

Much testimony has been introduced to show that in the foreclosure proceedings Roby, although not of record the solicitor of the Colehours, was, in fact, their principal adviser, and in the appeal proceedings, through the

Appellate and Supreme courts, he was their only adviser and solicitor.

Roby alleges that he appeared for himself, the Boone heirs, who held a second mortgage—and for certain owners of lots, and other defendants, and that C. W. Colehour was defaulted. That he claimed in his answer to the foreclosure suit that the Colehours had defrauded him out of a large amount of money, and he, Roby, was in equity entitled to all proceeds of the sale of the property after the payment of mortgages and liens.

He also denies that he acted, either in or out of court, as the adviser of the Colehours or either of them, in the foreclosure proceedings or appeals thereon.

There was no cross-bill by Roby nor issues made between Roby and the Colehours. I am satisfied from the evidence that Roby did advise and consult with the Colehours as to the defense of said foreclosure suit and the appeals thereon. The Colehours and Roby had the same interest in defeating the foreclosure suit, if possible, and if not, in reducing as much as possible the mortgagees' claim. There were many complications in that suit, which was before this branch of the court, and the claimed credits, not admitted by the Clarks, amounted to many thousands of dollars.

Being jointly interested they made common cause, and there is no doubt they often consulted together and that Roby gave his advice as any attorney and solicitor. It may not be upon any retainer. A retainer is not necessary to establish the relation. A volunteer stands in no better relation than a retained attorney. Roby was also jointly interested in the net profits of the land in controversy, and had an interest with the Colehours in the pro-

ceeds, if any, after the satisfaction of the mortgages and other liens.

If his professional advice or assistance was brought into play to assist that joint interest, it was the advice of a solicitor, not of a joint defendant, and the relation of solicitor and client must be held to be as well established as though there had been no joint interest. This ruling must be held equally applicable to the relation of the parties from 1873 up to the sale under the foreclosure decree.

It appears that Roby, the defendant, now claims to own all the lands and lots subject to the foreclosure sale, that he claims the entire equity of redemption, and that neither Charles W. Colehour or William H. Colehour have any interest whatever in the land, proceeds or net profits thereof. The equity of redemption is admitted to be worth $200,000.

As stated, he claims the Colehours embezzled moneys derived from sales to an amount sufficient to extinguish their interests, and leave him sole owner of whatever remains, if any, of the net profits. That cannot here be determined now, and is a question to be decided upon an accounting.

The defendant claims to own the legal title to the property in question by virtue of purchases under certain judgments rendered against Charles W. Colehour and William H. Colehour, and against them individually, and by reason of purchases made from persons who bought at the judgment sales, some of which judgments grew out of transactions connected with the land adventure, and others out of the personal debts of the judgment debtors.

There were a number of judgments:

The Mechanics National Bank judgment in 1875 for	$2,265 00
O. H. Horton, receiver, judgment 1878 for	4,113 58
O. B. McCoy, " "	3,700 00
Crane Bros. Manufacturing Co., 1879	3,591 00

Harding judgment and others not necessary to mention.

The titles derived under the judgments the proof tends to show cost the defendant less than $1,500.

It is claimed by the complainant that the purchases, under the judgments, and the titles made under the sales thereunder, were so made under agreements with Roby; and that large amounts of securities were placed in his hands for the purpose of protecting the interests of the Colehours and his own in the lands. The evidence is conflicting as to any special promises or undertakings of Roby in regard thereto. It is unnecessary to decide whether such were made or not. If Roby had any securities he must account therefor.

The question which underlies this claim of Roby of title under or through these judgments is this: Did Roby occupy towards the Colehours a business relation fiduciary in its character as to the Colehours, or a position of trust or confidence, which forbade him so purchasing such lots and lands and holding them, adversely to the Colehours? The complainant contends that Roby's one-fourth interest was given solely in consideration that Roby would act as the legal adviser of the enterprise or adventure. The evidence shows that Roby paid as much as $4,400 in money on the purchase from Hansborough, and the allegations of complainant as to the

services being the sole consideration are not sustained by the proof.

The evidence shows that from 1873, when Roby became interested in the property, he was at the office where the business of the trust or joint adventure was carried on several times a week, examining lot-books, books of sale, and consulting and advising as to such business; and that the Colehours received and relied upon his legal advice in matters in which they were jointly interested. This continued until the business of selling lots was practically ended by the refusal of the Clarks to release lots, which refusal was in 1878 or 1879.

There is also evidence that other attorneys acted for the Colehours in various court proceedings, but the consulting attorney in matters of trust or adventure was the defendant, Roby.

It does not, however, appear that he made any charge for such services or received any retainer or compensation.

I do not understand that Roby denies having given legal advice as to the trust or land matters, but claims that he did so only to a limited extent, and then only as a joint owner or party jointly interested.

The Supreme court in the Morrell case, 82 Ill., has decided that an agreement of the nature made by the declaration of trust gives no interest in the land, but is in the nature of a joint adventure or partnership.

Partners are termed quasi trustees for each other, and a fiduciary relation exists between them. The dealings of the partners with each other and the subject-matter of their relation are governed by the same rules which de-

termine the duties of actual trustees towards their *cestui que trustents.*

Pomeroy, Sec. 1088.

One duty is not to do any act inconsistent with the interests of the other partners in the copartnership.

The rule applies to agents, partners, etc., says Pomeroy, as well as technical trustees, and that the most important phase of this rule is that which forbids trustees and all other fiduciaries from dealing in their own behalf with respect to the matters involved in the trust, and this prohibition operates irrespectively of the good faith or bad faith of such dealings.

Pomeroy, Sec. 1077 and cases cited.

Under this authority—and it is unquestioned law—Mr. Roby could no more buy the land in question and hold it adversely to those jointly interested with him in this joint adventure or partnership than he could have done if he had been a trustee and the Colehours the *cestui que trustents* under an express trust.

The law will hold Mr. Roby to be a trustee for the Colehours, for C. W. Colehour to the extent of one-half, and W. H. Colehour one-quarter of all the property so purchased by him under or through such judgment proceeding, he, however, to be refunded the moneys which he has paid therefor.

He cannot hold the property, because he must be treated as acquiring it while the relation of attorney and client existed.

As stated in regard to his, Roby's connection with the Clarke foreclosure, if Mr. Roby's professional services and advice were brought into play and given (as I have

found they were) to assist this joint adventure or partnership; he occupied the relation of solicitor towards the trust or adventure, and he cannot be heard to say he acted or advised only as a party jointly interested. The position he occupied gave him the same opportunity to inspire confidence, to acquire an undue influence, to obtain knowledge of the subject-matter of the relation between them, of the judgments, liens, state of title, as if he had been only a feed attorney, or solicitor of the Colehours. He, whether called joint owner or attorney, must be governed by the same rules, trusts, incapacity of dealing, as if such relation of solicitor and client and none other, existed.

There is only one remaining question of importance in this case.

The bill makes an attack upon the deed by William H. Colehour and wife to Edward Roby, made in 1887, and asks that it be declared null and void and of no effect, and set aside as a cloud upon the title of complainant and said William H. Colehour.

The complainant cannot obtain all the relief prayed. If there was a fraud on William H. Colehour, or a cloud on his title, he must seek his own relief; this complainant cannot for him.

He is entitled to a decree that the conveyance of 1887 to Roby is void and of no effect, so far as it affects complainant's interests in said land, or under the said declaration of trust;

Because, first, Roby had notice of the deed of W. H. Colehour to C. W. Colehour of May 1, 1879, conveying the legal title to the land subject to the trust; and

Second, because so far as to the right to one half the

profits are concerned arising out of the declaration of trust made in 1873, such right is a mere chose in action and transferable only, subject to the equities of the original parties thereto. Even if the deed of May 1, 1879, had never been made, Roby could only hold the land under the deed of 1887, subject to complainant's rights to one-half the net profits under the declaration of trust.

THE CROSS-BILL OF W. H. COLEHOUR.

It recites the purchase of the land, the making of the two declarations of trust, and states the conveyances between the parties, the judgments, sales thereunder, as in original bill, and seeks relief upon substantially the same grounds.

It also seeks the relief of setting aside the deed conveying the land, made by W. H. Colehour and wife to Edward Roby in 1887.

What I have said as to the rights and relations of the parties as being interested in a joint adventure, and the relation of attorney and client which grew out of that arrangement or partnership, will equally as well apply to the case of the cross-complainant.

The legal title did not pass to Edward Roby for the reason that when cross-complainant made the deed of 1887, it was in Charles W. Colehour by the conveyance of 1879, and Roby took with notice of that conveyance.

Should the deed of 1887 be held to convey cross-complainant's equitable interest, or right to one-quarter share of the net profits?

As I have stated, Roby, not from any express retainer, but from the relation growing out of the business of the

trust or joint adventure, had for years occupied the position as attorney towards both the Colehours. He paid for the conveyance of 1887, a grossly inadequate consideration, and obtained it under a claim of a just demand against cross-complainant for about sixty to eighty thousand dollars, and under a threat to eject him from his homestead under title derived through one of the judgments referred to. It is not necessary to prove he acted fraudulently, but under the circumstances it was a hard and unconscionable bargain. The inadequacy of consideration and the undue influence of Roby over cross-complainant, arising as aforesaid, would alone entitle complainant to relief as against that deed.

The complainant and cross-complainant are entitled to the relief indicated in this opinion. There should be a receiver appointed to whom all parties must convey, and in order to realize anything for any of the parties before the time of redemption expires, he should be given power to sell and make conveyances.

An accounting should be had between the parties, from the commencement of this joint adventure. The alleged verbal settlement of 1879 is not sustained by the evidence, and will be disregarded as a settlement.

I have disposed of this case, as will be observed, without any finding as to actual or intentional fraud on the part of Mr. Roby, and it gives me pleasure to be able to state that the gross charges of fraud, among others, as to his having stolen the declaration of trust from its place of deposit, that the deed of W. H. Colehour to him was a forgery, and that he offered to betray his client Clarke in 1872 or 1873, are not proven by the evidence in this case. Several of the charges against him were evidently ma-

liciously made and with intent to injure him professionally.

Solicitors, however, must be made to know, that when drawn into professional and confidential relations with parties, whether by retainer, or growing out of business connections with such parties, they cannot acquire an adverse interest in the property or subject-matter out of which such relations arose, even though no actual fraud be intended; and cannot even do so after such relations have ceased, if the influence thereof still exists.

If the complainant and cross-complainant desire any amendment to meet the views expressed, they can prepare the same, but the order for a receiver and conveyances to such receiver may be prepared and entered at once.

987 &c.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1891.

EDWARD ROBY

vs.

CHARLES W. COLEHOUR, WILLIAM H. COLEHOUR ET AL.

Error to the Supreme Court of Illinois.

No. 1466, 1467, 1468 and 1469.

MOTION TO DISMISS WRITS OF ERROR OR TO AFFIRM JUDGMENT AND DECREE OF THE STATE COURTS, WITH SUGGESTION.

HENRY S. MONROE,
WILLIAM C. GOUDY,
For Defendants in Error.

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Solicitors, however, must be made to know, that when drawn into professional and confidential relations with parties, whether by retainer, or growing out of business connections with such parties, they cannot acquire an adverse interest in the property or subject-matter out of which such relations arose, even though no actual fraud be intended; and cannot even do so after such relations have ceased, if the influence thereof still exists.

If the complainant and cross-complainant desire any amendment to meet the views expressed, they can prepare the same, but the order for a receiver and conveyances to such receiver may be prepared and entered at once.

146 US 153

Office Supreme Court U. S.
FILED.
APR 16 1892
JAMES H. McKENNEY.
CLERK.

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IN THE

SUPREME COURT OF THE UNITED STATES.

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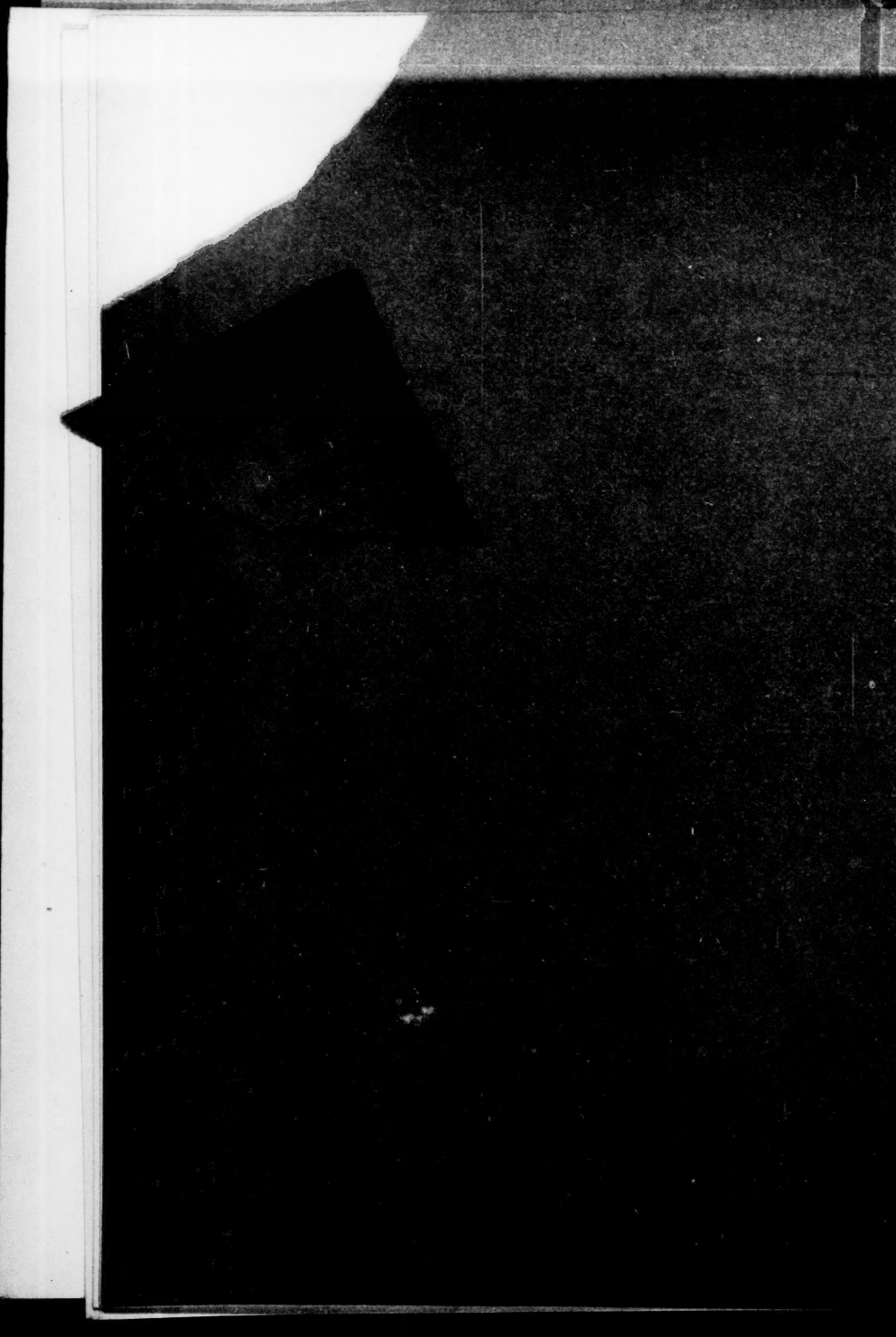
FOR DEFENDANTS IN ERROR.



IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1891.

EDWARD ROBY *vs.* CHARLES W. COLEHOUR, WILLIAM H. COLEHOUR ET AL.	Error to the Supreme Court of Illinois. Nos. 1466, 1467, 1468 and 1469.

MOTION TO DISMISS WRITS OF ERROR OR TO AFFIRM JUDGMENT AND DECREE OF THE STATE COURTS, WITH SUGGESTION.

TO EDWARD ROBY, PLAINTIFF IN ERROR:

Notice is hereby given to you that a motion will be made in the above entitled cases on the 2d day of May, 1892, or as soon thereafter as counsel can be heard, to dismiss the writs of error, or to affirm the judgment and decree of the court below, upon the points and for the reasons, and upon the authorities, herewith served upon you with this notice.

April 11, 1892.

Henry S. Monroe
William C. Goudy

Attorneys for Defts. in Error.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1891.

Edward Roby, *Plaintiff in Error*, *vs.* Charles W. Colehour, William H. Colehour *et al.*, *Defendants in Error.*	*Error to the Supreme Court of Illinois.* *Nos. 1,466, 1,467, 1,468 and 1,469.*

MOTION TO DISMISS THE WRITS OF ERROR, OR TO AFFIRM THE DECREE AND JUDGMENT.

And now come the defendants, Charles W. Colehour and William H. Colehour, and move the court to dismiss the writs of error herein, or to affirm the decree and judgment of the Supreme court of Illinois, for the following reasons:

1. There is no federal question arising on the record filed in this court.

2. No federal question arose in the trial court or in the Supreme court of Illinois, which was decided against the title, right, privilege or immunity, specially set up or claimed by the plaintiff in error.

3. The certificate of the chief justice of the Supreme court of Illinois is not sufficient evidence that a question reviewable in the Supreme court of the United States arose in the proceeding in the State court, but this court will examine the record itself for the purpose of determining whether any such question did arise or was decided.

4. Even if there was a federal question involved, the decision of the court below was right, and so clearly right

that the writs of error should be dismissed, or the decree and judgment affirmed.

5. Edward Roby, plaintiff in error, and Charles W. Colehour and William H. Colehour, defendants in error, both claimed title from a common source to the land in controversy, viz.: Henry F. Clark, *et al.* In deraigning title from the common source it appears that Edward Roby filed a petition in bankruptcy in the District court for the Northern district of Illinois, August 31, 1878, and that in the schedule filed by him he described his interest in the trust property mentioned in the bill of complaint, and that he purchased such interest from the assignee on the 21st day of January, 1882. By this proceeding Roby was revested with the interest which he had before he entered the bankrupt court, and acquired no greater interest than he then had. There was no evidence to the contrary, but the court in the decree found that he acquired by the purchase from the assignee the same title and interest which he had owned prior to the bankruptcy proceedings. In deraigning title from the common source by the other parties, Charles W. Colehour and William H. Colehour, it appeared that on the 22d day of September, 1876, Charles W. Colehour conveyed his title and interest to William H. Colehour, who reconveyed to Charles W. Colehour May 1, 1879; said deed being made subject to to the declaration of trust as to the respective interests of the parties. While the title was so vested in William H. Colehour, the grantor, Charles W. Colehour presented his petition in bankruptcy in 1878, and was subsequently discharged; he did not schedule any interest in this property, because none was vested in him. Even if any title was held by him, it was in trust and not with-

in the provisions of the bankrupt law, subject to the claims of creditors. The controversy presented by the pleadings and decided by the court, did not involve the construction of the bankrupt law nor any proceeding thereunder. The questions were: *First*, as to the existence of a trust in the proceeds of certain lands for the benefit of Charles W. Colehour, William H. Colehour and Edward Roby; *second*, as to the relations of attorney and clients; *third*, as to whether Edward Roby, while sustaining the relation of a partner in the adventure, and during the existence of the relation of attorney and client, could purchase in the lands sold under a judgment against the two Colehours, and hold the same adversely to them; *fourth*, as to the right of William H. Colehour to have a deed and assignment by him to Roby set aside, and *fifth*, as to the necessity, in protecting the interests of the parties, for the appointment of a receiver to take the title and redeem from the foreclosure sale.

6. The writs of error were not allowed by this court, or by the chief justice or any associate justice.

Wherefore the defendants in error pray that the writs of error be dismissed, or the decree and judgment of the Circuit court of Cook county, and the Supreme court of the State of Illinois, affirmed.

Henry S. Monroe
William C. Goudy

Attorneys for Defts. in Error.

Suggestions in Support of Motion.

The decree of the Circuit court of Cook county which was affirmed by the Supreme court of Illinois, the assignment of errors in that court, and the opinion of that court and the certificate of the Chief Justice of the Supreme court of Illinois, which appears in the transcript of the record, have been printed and are supposed to be all that is necessary for the determination of the present motion. The decree sets out very fully the findings of fact by the trial court, and furnishes a correct statement of the questions made and decided. It is not necessary to refer to other portions of the record to ascertain the facts on which the present motion must be decided.

The parties to this controversy, in the main case, being the one in which the evidence was taken and the decree entered, were Charles W. Colehour, who filed the original bill, and William H. Colehour, who was a defendant thereto, but subsequently filed a cross-bill on the one side, and Edward Roby on the other. There was no question whatever made by the issues which required a decision as to the construction of the bankrupt law or the rights of any of the parties arising thereunder. There was no controversy between these parties as to any rights or title under the bankrupt act.

It is true there is a certificate of the chief justice stating that the title of Edward Roby passed through the bankrupt court, and also that C. W. Colehour did the same, but such statement is made inadvertently and not sustained by the record.

Parmelee v. *Lawrence*, 11 Wall., 38.
Felix v. *Scharnweber*, 125 U. S., 59.
Brown v. *Atwell*, 92 U. S., 330.

By reference to the facts recited as found in the decree it will appear that the title to the land described in the bill was originally vested in Henry F. Clarke, Robert D. Clarke, Harriet S. Clarke and Sarah J. Clarke, who conveyed the same to William H. Colehour, July 18, 1871, but that he was a naked trustee without any interest in the property. He gave his note for the deferred payments of the purchase money, and secured the same by a deed of trust made to Turner. The parties interested at that time were William Hansbrough, Charles W. Colehour, Wesley Morrill and Francis M. Corby; and such interest was in the net profits to be derived from contemplated sale of the property. The relation between these parties has been held to be by the Supreme court of Illinois, a partnership relating to the net profits, to be derived from the sale of the land, and that no one of them had a legal title to the land.

Morrill v. *Colehour*, 82 Ill., 613.
Boone v. *Clark*, 129 Ill., 446.
Opinion of Supreme court in this case.

It appears that the parties in interest changed, so that in 1873 a declaration of trust was executed by William H. Colehour declaring that Charles W. Colehour had one-half interest, Edward Roby one-quarter interest, and William H. Colehour one-quarter interest. There were two of these written declarations, one dated August 16, 1873, the other without date but made in October of that year. One of the questions presented and decided was as to which of these declarations of trust was the one binding upon the parties, and it was held by the court that the declaration made in October, as claimed by Roby, was the true document and controlled the parties.

Litigation arose in regard to portions of this property during the existence of the trust and the partnership, and one of the questions presented and decided was as to whether the relation of attorney and client existed between these parties; or, in other words, whether Roby acted as the attorney for the Colehours. The court decided that such relation existed. It was thus established that there was a partnership and a trust, and there was also the relation of attorney and client.

These propositions were important for the reason that Roby had purchased portions of the property under judgments rendered against the two Colehours, while this relation existed, and he claims that thereby the interest which was vested in the two Colehours had passed to and was vested in him. The court held that he was disabled from acquiring an adverse title, and that he was only entitled, in an accounting, to any sums that he might have paid for the acquisition of such titles. It further appeared from the finding of facts that in 1887, while these relations existed, Roby procured a deed from William H. Colehour and also an assignment of his interest in the proceeds of the sale. It was claimed in the original, as well as in the cross-bill, that such conveyance and assignment were obtained under circumstances which justified the court in setting the same aside and leaving the William H. Colehour entitled to his one-fourth interest, as before such deed and assignment were made. The court held and decided that these should be annulled and set aslde.

It appeared in the proofs that in 1878 Roby presented a petition in bankruptcy and described his interest in these lands as a part of his assets, and that in 1882 the assignee sold such interest to Roby for the sum of $4, thereby

revesting him with the title and interest, whatever it was, which he held before entering the bankrupt court. That interest was the right, as fixed by the declaration of trust, to one-quarter in the proceeds arising from sales. The decree allowed him that interest. There was no contest as to the validity or effect of these proceedings in bankruptcy. No more could have passed through the assignee in bankruptcy than Roby had, and whatever that was, he acquired again.

It further appeared from the proceedings that Charles W. Colehour, conveyed and assigned all his interest to William H. Colehour, in 1876, and in 1878 he presented his petition in bankruptcy, but did not describe any interest in this land, or in the proceeds, for the reason that he had previously conveyed the same to William H. Colehour. May 1, 1879, William H. Colehour conveyed and assigned the whole of the property which was then vested in him to Charles W. Colehour, but subject to the previous trust as shown by the declaration of trust.

No question was raised or decided in regard to the effect of the bankrupt law or the title of either of the Colehours.

These were the only questions presented by the pleadings or on which issues were made, or which were decided by the trial court, and the only ones which were reviewed and decided by the Supreme court of Illinois.

Another feature exists in the case which arose because there had been a foreclosure of the deed of trust, given to secure the deferred purchase money to the Clarkes, and sale had been had, and the period of redemption therefrom, allowed by the laws of Illinois, was running. Because of complications about the title, and the pecuni-

ary condition of the parties, the only way in which the money could be raised to effect a redemption, and save the value over and above the amount so required to redeem, was by consolidating the title in a receiver and giving him authority to raise money to effect a redemption, and to sell the property. This the court allowed. This branch of the relief was merely a supplement to the other questions involved. It certainly presents no federal questions.

Even if a federal question was raised by Roby in the trial court, or in the Supreme court, neither the trial court or the Supreme court considered such question as having the least effect upon the determination of the case.

AUTHORITIES SUPPORTING THESE PROPOSITIONS.

Spies v. *Illinois*, 123 U. S., 163.
Klinger v. *Missouri*, 113 Wall., 257.
De Saussure v. *Gaillord*, 127 U. S., 217.
Wood Mowing, etc., Machine Co. v. *Skinner*, 139 U. S., 293.
Brooks v. *Missouri*, 124 U. S., 394.
Twitchell v. *Commonwealth*, 7 Wall., 324.

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Attorneys for Defendants in Error.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1891.

EDWARD ROBY

vs.

CHARLES W. COLEHOUR ET AL.

Four Cases Numbered 1466, 1467, 1468, 1469.

BRIEF AGAINST MOTION TO DISMISS.

RESTATEMENT OF THE CASE.

Since the brief has been in type the following restatement has been written.

Charles W. Colehour was a lawyer in Chicago, three years older than Roby, and of several years more practice and experience as a lawyer.

William H. Colehour (the brother of Charles) Wesley Morrill, Francis M. Corby and Wm. Hansbrough were laymen.

In 1871 406 acres of land near Chicago were conveyed to William H. Colehour for $100,000; for $90,000 of which he gave his obligations to Henry F., Robert D., Sarah J. and Harriet S. Clark, the vendors, secured on the land by trust deed to Voluntine C. Turner, containing power of sale.

$10,000 cash was furnished by Charles W. Colehour, Wesley Morrill, Francis M. Corby and William Hansbrough.

William H. Colehour had no interest in the land or the profits, but had a right to subdivide the land and sell and release purchasers, and to apply the proceeds in extinguishment of his obligations secured upon it, as well as taxes, etc.

$5,000 being furnished by Charles W. Colehour, Morrill and Corby, William H. Colehour gave to them the following:

"CHICAGO, Ill., August 1, 1871.

KNOW ALL MEN BY THESE PRESENTS that F. M. Corby, Wesley Morrill and Chas. W. Colehour are together jointly and equally interested in one-half of the four hundred and six acres of land situated in Hyde Park, Cook County, Illinois, this day, to wit: July 18, 1871, bought of H. F. Clarke and others; they having advanced one-half of the purchase money advanced in cash, to wit: ten thousand dollars, they paying five thousand dollars for the purchase of the same. It is hereby agreed that out of the profits, if any, to be realized from the sale of said lands, the said parties above jointly shall be entitled to and receive the one-half of the net profits from any sale of said land.

Witness my hand and seal this first day of August, 1871.

"WM. H. COLEHOUR. [SEAL.]"

In Morrill *v.* Colehour, 82 Ill., 613, it was held that the relation between Charles W. Colehour, Morrill and Corby was substantially a partnership, and that they held no interest in the land that could not be released orally to Wm. H. Colehour, notwithstanding the statute of frauds, and that it was so released to him May 1, 1872.

$5,000 being furnished by Wm. Hansbrough, the following deed was given to him:

"CHICAGO, Ill., July 31st, 1871.

"KNOW ALL MEN BY THESE PRESENTS, that the four hundred and six acres this day bought of H. F. Clarke by me in my name, is one-half the property of Wm. Hansbrough—he having bought the one-half and paid the one-half of the cash payment, to wit: five thousand dollars; and as the same is sold, he to have one-half of the profits.

WILLIAM H. COLEHOUR, [SEAL.]

Witnessed by

C. W. COLEHOUR."

In Boone *v.* Clark, 129 Ill., 446, it was surmised that substantially the relation of partnership existed between Hansbrough, Morrill, Corby and Charles W. Colehour; so that (Hansbrough having assigned to Boone, who sold to Charles W. Colehour and Roby, for $5,400, paid by Roby ($4,400 in cash), and balance in notes of William H. Colehour, secured by *second mortgage on part* of the land), in the suit for foreclosure of the purchase money, mortgage or trust deed, brought by the Clarks, the original vendors of the land, it was held that Boone was not entitled to have the assets marshaled as against the Clarks, though they had released from their incumbrance land enough to satisfy it, without applying the land so mortgaged to Boone.

A partnership was not alleged, nor in issue, and was not res adjudicata, in that case.

Whether there was a quasi partnership or not is probably immaterial in this case, for adjudication in bankruptcy and seizure of assets will dissolve a partnership, and discharge will extinguish partnership obligations.

William Hansbrough and Boone had no notice that Morrill or Corby had any interest, or of the arrangement between them and C. W. and W. H. Colehour until Morrill brought his suit August, 1874.

In 1873, William Hansbrough's half was sold and conveyed to Edward Roby and Charles W. Colehour by deed. Roby advanced in cash $4,400, and $1,000 in commissions on his half of the Hansbrough half interest; the balance, of the cost of the Hansbrough half interest, was secured to be paid out of the land in the same manner that the purchase money notes to the Clarks were to be paid.

Roby made additional advances on account of the land, amounting to about twenty thousand dollars.

October 18, 1873 (the date of the deed by Boone to Roby and Charles W. Colehour) William H. Colehour gave Roby a declaration of trust reciting that Roby owned *one-quarter*, Charles W. Colehour *one-half*, and William H. Colehour *one-quarter* of the land of which the title remained in him. He (William) reserving the right to manage and sell the land *and discharge purchasers* in order that he might pay his obligations secured thereon, etc.

At the trial Charles W. Colehour (to sustain his averments that Roby acquired his interest by betrayal of the Clarks, the vendors, whose attorney Roby was, and that the sole consideration for his quarter was a bribe to betray his clients and a promise to be the Colehours' attorney) produced a fabricated declaration, in Charles W. Colehour's handwriting, signed by William, which Roby had never seen or heard of, and which was false in every particular; it bore date Aug. 16, 1873.

William C. Goudy was the regular attorney and legal adviser of both Colehours touching this land from its purchase in 1871 to the decree in this case, and indeed till now. In the conduct of the business Roby sometimes consulted as to the general conduct of the property. There were some difficulties that arose and were litigated respecting the title. Judgments were got against Wm. H. Colehour and Charles W. Colehour on their private debts not connected with this land, in favor of The Mechanics' National Bank and others, and Creditors' Bills were prosecuted against the Colehours.

Roby, for the protection of his interest, consulted with the Colehours and Mr. Goudy, using his knowledge as a lawyer, and participating in some of the suits affecting the title.

He was never retained by the Colehours, did not act under any agreement with them, but only to protect his own interests, the same as Charles W. Colehour (also a lawyer) acted and consulted as the representative of his share.

August 30, 1878, Charles W. Colehour petitioned in Bankruptcy scheduling $819,675.45 in debts. His only assets were his wearing apparel, which he claimed as exempt. He had retained his interest in the property in question (subject to a mortgage thereof to Wm. H. Colehour to secure his endorsement for $20,000 of notes), but he did not schedule the interest.

He got his discharge in 1883.

August, 31, 1878, Roby filed his petition in bankruptcy, in which he scheduled the following as assets:

"SCHEDULE B."

"In the matter of Edward Roby. Bankrupt.

Property in reversion, remainder or expectancy, including property held in trust for him or subject to any power or right to dispose of or to charge.

The interest derived by Declaration of Trust in 406 acres of land in Sections 8 and 17, T. 37, R. 15, Cook County, Illinois, executed by William H. Colehour to William Hansbrough, July 31st, 1871, which interest was assigned to Charles W. Colehour and Edward Roby in consideration of $19,066.47, October 18, 1873. Said Declaration of Trust is in the following words:

"Chicago, Ill., July 31st, 1871.

Know all men by these presents, that the 406 acres this day bought of H. F Clarke, by me, in my name, is one-half the property of William Hansbrough; he having bought the one-half, and paid the one-half of the cash payment, to wit: $5,000. And as the same is sold he to have one-half of the profits.

WILLIAM H. COLEHOUR.

Said interest is further established to be one-fourth the net profits, and *all the advances* made by me on account of said land, by declaration of said William H. Colehour given subsequently to the above assignment.

Said land is particularly described in a deed from Henry F. Clarke, Robert D., Harriet S. and Sarah J. Clarke to said William H. Colehour, dated July 18, 1871, and recorded in Cook County, Illinois, and embraces all the north three-quarters of E. fractional ½ of Sec. 17; also all S. ½ Sec. 8, and part of N. ½ Sec. 8, lying East of a line drawn from the intersection of the North line of said S. ½ with the Lake Shore & M. S. R. R., at right angles to the line of said R R. to Lake Michigan, excepting said M. S. and the P., Ft. W. and C. Railroad lands.

Said lands have in part been subdivided by the name of Ironworkers' Addition to South Chicago; and sales have been made therein by said William H. and Charles W. Colehour, as appears from the records, to an amount exceeding $233.000; most of the proceeds of which have been received by Charles W. Colehour. And the interest of your petitioner in said proceeds, and in the lands remaining, which amount to about 240 acres or 2,400 lots, your petitioner believes to be over $153,000.

EDWARD ROBY,
Petitioner."

Nov. 23, 1880, Roby received his discharge.

In 1882, nearly four years after his assignment, Roby purchased his assets of the assignee, and the District Court approved the sale and ordered the conveyance.

In this suit by Charles W. Colehour, based entirely upon the relation of 1873, Roby pleaded and proved his discharge in Bankruptcy, and claimed that he was dead as to all relations to the property prior to 1878 (*civiliter mortuus*), and that he bought as *a stranger*, with all the rights of a layman or any other purchaser who had been a total stranger to every thing prior to that time.

The Illinois Court held (and it was necessary to its decision that it should hold) that the proceedings and judgment of the District Court of the United States did not have that effect.

Counsel for the motion now urge this court to deny that effect to the judgment and proceedings of the District Court of the United States, though *they do not cite an authority*, and we believe they cannot find an authority anywhere to support their position, and though the decree finds Roby was guilty of no fraud, and no cause to take his discharge out of the benefit of the law was alleged, *and no allegation of new promise after discharge was made.*

Among the things sued on by Charles W. Colehour was a contract, dated May 29, 1873. by William to pay him $5,000 a year to manage the land in question, the payment of the salary being secured on the land. It was averred that Roby took subject to that security, and the court found the security in the decree. The services were rendered from 1873 till in 1878, then Charles W. Colehour went abroad and rendered no more services thereunder.

The Supreme Court of Illinois held that Charles W. Colehour could sue and charge the land on that contract, notwithstanding his estate was vested in his assignee in Bankruptcy by the proceedings of the District Court of the United States.

After Roby's petition, Aug. 31, 1878, and adjudication, Sept. 7, 1878, William H. Colehour held the title of the land *in trust for Roby's assignee in Bankruptcy, first*, to pay to him *the advances* Roby had made amounting to some $20,000, and *interest* thereon from dates in 1873 and 1874; *second:* to pay to him a sum equal to *one-third*

of the $234,000, which William H. Colehour had received and applied to his own use and that of Charles W. Colehour, *with interest* thereon, so as to make Roby's *one-fourth* of the whole proceeds equal to one-third of the *three-fourths* Charles and William had agreed for when Roby bought in; *third:* to convey to him (Roby's assignee in bankruptcy) *one-fourth* of the land remaining.

As the land so vested in Wm. H. Colehour *in trust* Aug. 31, 1878, was charged with the original purchase money mortgage, then amounting to $100,000, and was worth very little more than that, the amounts so due to Roby's assignee in bankruptcy could not be paid out of its proceeds, but would exhaust the whole, and thus he held *the only beneficial interest* under the trust; and all the land then held by William in trust, was thus held in trust *only* for the assignee in bankruptcy of Roby.

A deed (claimed by Roby to have been manufactured in 1888), dated May 1, 1879, by Wm. H. Colehour to Charles W. Colehour (the undischarged bankrupt), substituting him as trustee for said assignee in Bankruptcy, is sustained by the Illinois Court. Roby's assignee never had notice of it at any time, and Roby had no notice of it till January 12, 1887.

Roby set up and claimed that this deed was void as against Bradford Hancock, said assignee in bankruptcy, and as against Roby as purchaser from said assignee in 1882.

Roby claims that by the sale of the assignee in bankruptcy under the order of and approved by the District Court of the United States, in 1882, he took the title free from that deed.

The authorities are ample that a purchaser with notice from one who had no notice, stands in the shoes of his vendor who had no notice. (In this case neither vendor nor vendee had notice of that deed of May 1, 1879.) The authorities are also ample that a deed substituting another trustee in such a case is void. Yet the Illinois court held that the order of sale, and sale, and approval of sale, by the District Court of the United States, did not vest in Roby a title free from that deed.

After the estates of both Roby and Charles W. Colehour were vested in their assignees in bankruptcy, one Horton recovered a judgment against William H. Colehour and Charles W. Colehour for $4,113, on which an execution was levied on upwards of 150 acres of above 406 acres held by William H. Colehour, and the same was sold for $3,250 to one Landis, *a stranger*. Not being redeemed it was conveyed by the sheriff to Landis, Nov. 1, 1883. Roby bought this land of Landis with his own money, March 26, 1884, and received a deed.

The Illinois court charged this title with a trust as to one undivided half in favor of Charles Colehour and one undivided fourth in favor of Wm. H. Colehour, holding that Charles W. Colehour could sue on his contracts of 1873, and charge Roby by means of those contracts, notwithstanding the bankrupt proceedings; *that the proceedings in the District court of the United States in the case of Charles W. Colehour and in the case of Roby*, had not dissolved the joint relations, that Roby's discharge had not discharged him, and that, though Roby had been a stranger to that title for so many years, it was as if he had not parted with his title to his assignee in bankruptcy; and as if he had not in consideration thereof been discharged.

The petition, adjudication and assignment in bankruptcy of Charles W. Colehour, and the petition, adjudication and assignment of Roby and his discharge were pleaded by Roby in bar and proved; *Charles Colehour did not amend his bill* but recovered on his claims of 1873, the Illinois court holding that all his claims of 1873 were still subsisting *in him* and *against Roby* and that they made Roby a trustee for him in buying lands in 1884, etc.

This seems to be an attempt to obtain a decision of this case on its merits, out of its order.

The clerk has not notified us of the amount required to print the record, as the printing did not seem due,

hence a hearing on the merits must be embarrassed. If the question presented by the writ, the record and the assignment of errors, is one giving jurisdiction to this court, plaintiff in error is entitled to a trial of that question by the record.

In their brief at page 5, the counsel for defendants in error say:

"It is true there is a certificate of the Chief Justice stating that the title of Edward Roby passed through the bankrupt court, and also that C. W. Colehour did the same; but such statement was made *inadvertently*, and is not sustained by the record."

The record repels the *innuendo.*

Exceptions to the decisions of the court on issues of fact, as well as law, save themselves in chancery. (Fanning v. Russell, 94 Ill., 390–1). It is the duty and practice of the Supreme court of Illinois, in reviewing causes in chancery, to examine and determine for itself the truth in respect to controverted questions of fact, from the evidence in the record. (*Miller* v. *Cook*, 135 Ill., 190, 201; Walker *v.* Carey, 53 Ill., p. 477; Hughes *v.* Washington, 65 Ill., pp. 247-8; Moss *v.* McCall, 75 Ill., p. 195; Driscoll *v.* Tannock, 76 Ill., 154; Spring *v.* Olney, 78 Ill., p. 106-7; Goodwillie *v.* Milliman, 56 Ill., 527; Hamilton *v.* Stewart, 59 Ill., 330, p. 335; Albright *v.* Smith, 68 Ill., 181, p. 184; 2 Daniels Ch. Pr., 1484, 980; Brown *v.* Buck, 75 Mich., 274; Buckingham *v.* McLean, 13 How., 150; Johnson *v.* Harmon. 94 U. S., 371.)

Even on writ of error to the Appellate court of any district of the state, the Supreme court of Illinois has solemnly adjudged that "*it is the duty of the court to review the evidence as to facts found which constitute the basis of the decree.*" (Fanning v. Russell, 94 Ill., 389; J. & C. R. R. Co. v. Healy, 94 Ill., 418; Stillman v. Stillman 99 Ill., 199; French v. Gibbs, 105 Ill., 527.)

A bill of exceptions, in an action at law, is for no purpose but to preserve questions that would not otherwise be preserved for review by a court having jurisdiction to review and reverse. (*P. M. L. Co.* v. *Chicago*, 56 Ill., pp. 306–7.) The time when a bill of exceptions must be made has been determined by the courts "from the

nature and reason of the thing," there being no limitation except that (2 Tidd. Pr., 863, 864, 865). In the exercise of its constitutional authority to review the judgments of state courts, this court announced as a principle upon which the court had constantly acted, and that it might be regarded as the law of the court, that

> among other ways of exhibiting the federal question, it may "be entered on the record of the proceedings of the appellate court, *in cases where the record shows that such a point may have arisen and been decided*, that it was in fact raised and decided; and this entry must appear to have been made by order of the court, or by the presiding judge by order of the court, and certified by the clerk as part of the record in the state court."

Coupled with this, this court decided, that where the certificate of the presiding judge is certified up as part of the record, this court will presume that the certificate of the presiding judge was made by authority of the court. (*Armstrong* v. *The Treasurer*, 16 Peters, pp. 285, 286.)

This rule of practice was thus announced *fifty years* ago, and had been *constantly acted upon* before that (16 Pet., 285). It would seem to be recognized by and to be within the equity of Sec. 1,003 of the Revised Statutes of the United States. It is in aid of the remedy, is "according to the nature and reason of the thing," and has been constantly acquiesced in by the state courts, from the beginning of this jurisdiction.

The question whether a right given by a law of the United States has been violated is for the ultimate decision of this court; and all courts may make reasonable rules for bringing matters into court, which are necessary to the exercise of the jurisdiction clearly vested in them. (Bacon's Abr., *title* COURTS, (E), What is incidental to all courts in general; 1 Rolle Abr., 526.)

Under these rules, application was made to the judges of the Supreme court of Illinois assembled at Mt. Vernon, to the end that this court might review their judgment, and they have solemnly made up the record. Upon perusal of that record there is no room to say that it was made inadvertently. It was an act of the Court, of the most deliberate character; done under the rules of this court, for the purpose of presenting questions for review by this court.

The *second* assertion of the counsel, viz: that the certificate is not sustained by the record, is to be tried by the record.

How the federal question must appear by the record, has been repeatedly stated: If the action is at law,

It must appear in the pleadings of the suit;

Or from the evidence in the course of the trial;

In the instructions asked for; or

From exceptions taken to the ruling of the court;

It must be that such a question was necessarily involved in the decision, and that the state court would not have given a judgment without deciding it.

Lawler v. Walker, 14 How., 152.
R. R. Co. v. Rock, 4 Wall., 180.
Parmelee v. Lawrence, 11 Wall., 38.

In suits in equity:

It may appear from the pleadings;

Or from the evidence in the record;

Or by the findings of the court in connection with the evidence; where such finding upon some of the issues, omitting to pass upon other of the issues, accords with the common practice of the State court, as in Illinois;

Or by certificate of the decision of the federal question;

Or in the body of the decree;

Or in any other manner, if by the record it appears that the State court would not have determined on the *issue* submitted to it for judgment, without deciding the federal question.

Armstrong v. Treasurer of Athens Co., 16 Pet., p. 285.
Murdock v. Memphis, 20 Wal., pp. 633–4.

"The record of the case, *its pleadings*, bills of excep-"tions, judgment, *evidence*, in short, *its record*, whether "it be a case in law or equity, must be the chief founda-"tion of the inquiry." (20 Wal., p. 634.)

The certificate that such a question arose and was decided against the plaintiff in error cannot supply the want of *all* evidence to that effect in the record. The

office of the certificate, as it respects the federal question, is *to make more certain and specific what is too general and indefinite in the record*, but is incompetent to originate the question.

Felix v. *Scharnweber*, 125 U. S., 54, pp. 59–60.
Parmelee v. Lawrence, 11 Wal. 36, p. 39.
Brown v. Atwell, 92 U. S., 327, pp. 329–330.

Where the bill and answer show that such a point might have arisen, and this certificate on the record states that it did arise and was decided, the case comes within the statute, and this court must take jurisdiction and examine whether the point so certified was rightfully decided, (provided it was a point on which the decision may have hinged.)

Armstrong v. Treasurer of Athens Co., 16 Pet., p. 286.

Still a record must not be evasive. A State court cannot, by putting its decision on a false ground, oust this court of its jurisdiction, or a citizen of the protection of the laws. (*Crowell* v. *Randall*, 10 Peters, 394–5.)

Following the counsel we look at "the main case in which the evidence was taken and decree entered" (see their brief, p 5): the bill of *Charles W. Colchour* v. *Edward Roby* and William H. Colehour, on which Charles W. Colehour recovered from Roby an undivided half of the lands in controversy.

(We present, herewith, printed copies of the pleadings.)

Charles W. Colehour's bill is divided into paragraphs.

The 1st, 2d and 3d aver a purchase in the name of W. H. Colehour, of 406 acres, in 1871, for $100,000—$10,000 in cash and balance deferred, secured by mortgage, the title being conveyed to William H. Colehour in trust for the purchasers.

That (4th & 5th) in 1873 the equitable title was vested one half in Charles W. and the other half was purchased by and conveyed to Wm. H. Colehour (the trustee).

That (6th, 7th) in 1873 the creditors on the purchase

money mortgage advertised the land for sale, Roby acting as their attorney; and that he offered to betray his clients and protect the land against any foreclosure proceedings, and act as attorney for the Colehours till the entire debt should be paid or removed, for one-fourth of what might be saved on final sale of the land.

That (8th) at the time of that arrangement with Roby it was agreed that Orator (Charles W.) should have sole management and receive $5,000 a year, and Roby should attend to all legal matters in regard to the land; and, on sale, the net profits should be divided, one half to Orator, one fourth to Roby and one fourth to Wm. H. Colehour.

That (9th) May 29, 1873, Wm. H. Colehour gave orator (Charles W.) the deed following:

(POWER OF ATTORNEY *of May 29, 1873.*)

Know all men by these presents, that I have and by these presents, do hereby make, constitute and appoint Chas. W. Colehour my true and lawful attorney, in fact for me and in my place and stead to take the possession, sole control and charge of and over the following described land, to wit: (This instrument contains a description of all said lands so conveyed to Wm. H. Colehour). Over all of which land I give my said attorney absolute power and control; to lay out in lots, blocks and streets; to donate portions thereof to persons or corporations for locations for manufacturing purposes; to subscribe for the stock of any company, pay for the same, and charge the same to me; to make all sales of land in lots or blocks; make deeds in my name, and acknowledge them for me; to receive all moneys and notes for any deferred payments and collect the same; to act as trustee in all trust deeds, receiving all notes; to borrow money when required, and pledge said notes; to pay all taxes and assessments; to pay off any and all incumbrances of mine, all debts of mine; all notes he may give, for any purposes; to bid in his own name any property sold under pledge of security of mine; to buy up all judgments against me; to employ any lawyer for any of my law business; and pay him to begin any suit; defend any suit for me; to dismiss any of my suits or defenses at his option; to settle any suits, and when the Clarke mortgage for $86,000, and the Palmer mortgage for $4,000, and all other of my indebtedness now existing or which may hereafter come into existence, are fully paid and the land free of all charges, then this power shall cease.

I hereby agree to pay him out of the proceeds of sales of land, the sum of $5,000 each year from the date hereof, for his services.

and this power of attorney is made continuous and irrevocable, until such time as the land is free and clear, and until my said attorney is paid all sums he has advanced, and his salary is fully paid.

Hereby ratifying and confirming all my said attorney may do in my behalf, I hereby set my hand and seal this 29th day of May, 1883. WILLIAM H. COLEHOUR. [SEAL.]

That (10th) at the time of said arrangement with the said Roby, said paper was shown to him, as being then in full force and effect, and he consented to it, and approved the same, and took his said interest subject thereto.

That *on the 16th day of August, 1873*, in order that the rights of the parties might be fixed and determined in said land, the following instrument was made and executed by William H. Colehour, and delivered to your orator, to be kept for the benefit of the parties interested in said land, to wit:

(DECLARATION OF TRUST, *dated August 16, 1873.*)

KNOW ALL MEN *by these presents*, that I, William H. Colehour, a bachelor, being the owner in fee simple of the land in the South Half of Section Eight (8), and the North Three Quarters of East Half of Section Seventeen (17), all in Town Thirty-Seven (37) N., R. Fifteen (15), East of the Third P. M., Cook County, Illinois, more particularly described in deed dated July 18th, 1871, made by Robert D., Henry, Sarah J. and Harriet S. Clarke to me, which land is *subject to an incumbrance* of $86,000.00 to said Clarkes, and $4,000.00 to Mary Palmer, and other sums due on account of said lands, *do hereby declare* that Charles W. Colehour shall be entitled to the one-half of said land, or the profits to be realized out of it, after the above debts are fully paid, and all other necessary sums of money hereafter required shall be fully paid, and Edward Roby shall be entitled to the one-quarter of land, or profits thereof, when all debts against said land hereafter have been fully paid.

I reserve the right to handle the land as I please, without interference from Chas. W. Colehour and Edward Roby.

And should either of them seek to acquire any interest in the lands before it is fully paid for, he shall forfeit the interest he is above to be entitled to by the terms of this declaration.

The power of attorney heretofore given to Charles W. Colehour shall remain in full force.

The sole consideration for the interest of said Roby as above named, grows out of his services as attorney to be rendered me

as I require the same, until the land is fully cleared of all debts of every nature.

The terms of this trust cannot be changed.

Charles W. Colehour shall be my successor in this trust, after him Edward Roby shall be Trustee if Charles W. Colehour shall give up the Trust.

I reserve the right to act as Trustee, however, during my pleasure.

In witness hereof, I have hereunto set my hand and seal, this 16th day of August, 1873.

WILLIAM H. COLEHOUR. [SEAL.]

I have this day, August 16th, 1873, given to Hansbrough, for his interest in said lands, my notes for $15,066.47, and taken up my contract with him.

That said declaration of trust was assented to and accepted by Roby, and *from that day to this*, your orator acted under said instrument, and accepted the same as the sole agreement in defining the interest of the parties in the land.

That (11th, 12th) in 1873–4 orator did acts of management and from 1872 to 1879 orator had sole charge, and that (13th) *during the years from 1873 to 1878* orator was constant in the management and never received for his own use from the sales in any year more than $1,500, and some years not that. That (14th) in 1878, and thenceforward sales were prevented by the mortgagee.

That (15th) in 1881 the mortgagee began to foreclose; that (16th) Roby (in 1873) at the time said arrangement was made with him for one-quarter of the net profits of said land assured orator he knew facts that would prevent foreclosure, and when the bill was filed he said he could defeat the foreclosure suit.

That (17th) about this time Roby conceived the design of taking advantage of the confidential position as attorney of orator and Wm. H. Colehour and their financial position to get control and cheat them out of the property, though for a long time thereafter he pretended to act with them and for their interests.

That (18th) in September, 1878, a judgment was recovered in Superior Court of Cook Co., Ill., by O. H. Horton for $4,113.58; and that the debt was for money paid on said purchase money mortgage.

That execution was issued on said judgment and levied

on the following lands (describing about 150 acres and 155 lots, part of above 406 acres); which were by the sheriff sold to Roland R. Landis; and a deed was made and delivered to said Landis Nov. 1, 1883.

(Note: the record shows that the date of this judgment was Oct. 3, 1878, the levy July 3, 1882; the sheriff's sale of said land for $3,250, to Landis, July 31, 1882; and the deed Nov. 1, 1883, as here averred).

That *Roby* had in his possession notes belonging to orator and Wm. H. Colehour for $20,000, and *offered to buy this land* of Landis, and "*hold the title* in trust for all three under the same trust it had formerly been held by said William H. Colehour."

That Roby did buy this land from Landis, and had the same deeded to him by deed (dated March 26, 1884), recorded June 6, 1884, consideration $600; and claims that he is absolute owner of said land as against your orator and William H. Colehour.

(Note: Roby set up the statute of frauds, and Charles Colehour testified that there was no writing, and that the only promise by Roby to hold this land in trust was *after* he had purchased. There is no other evidence on that except that which denied any such promise at any time.)

That (19th) at June term, A. D. 1878, of said Superior Court judgment was recovered against orator (Charles W. Colehour) by McCoy, for use of Frank W. Harding, for $3,700.

That execution was duly issued and levied on (the whole 406 acres, except four lots), which was duly advertised, and sold May 23, 1885, to George F. Harding, for $500, and that a deed was duly issued to him.

"That said Roby informed your orator and said William H. Colehour that *he had got* said George F. Harding to buy the said lots and hold the same for the benefit of your orator and William H. Colehour and himself," and to be deeded when the balance of the debt to Frank W. Harding should be paid.

Afterwards, in 1888, Frank W. Harding was fully paid out of moneys received from part of said trust property.

That February 8, 1888, said George F. Harding deeded to said Roby said lands, and he now claims to own the

same absolutely as against your orator and William H. Colehour.

(*Note:* The record shows the date of this judgment was June 4, 1878; the levy April 20, 1885; the sale to George F. Harding May 23, 1885; sheriff's deed to him October 21, 1886; and that the consideration of the deed of George F. Harding to Roby, of February 8, 1888, was $4,721, which deed also included a judgment title on certain of the lands acquired by Harding on a judgment against William H. Colehour.)

That (20th) September 24, 1879, judgment was recovered in Superior Court, by Crane Brothers Manufacturing Company, against orator (Charles W.) and William H. Colehour, for $3.591; that execution was duly levied on (several hundred lots named, parcel of the 406 acres); which lots and lands were, by said sheriff, duly advertised for sale, and sold to said Roby September 14, 1886.

That prior to said sale the said Roby, at the request of your orator, bought said judgment and paid therefor the sum of $750.00, of which your orator paid $250.00; and it was then agreed between your orator and said Roby that said Roby should hold the same *for the benefit of the Trustee of said land;* and when said judgment was so bought, by said Roby, it was agreed, that if a sale should afterwards be made under said judgment, said Roby should purchase said lands and hold the same *as trustee as provided in said Declaration of Trust, dated August 16th, 1873;* and said Roby then and there agreed with your orator so to do, but he now claims to hold the same for his own sole use and benefit, and denies that your orator and said William H. Colehour have any interest in the same.

(*Note:* The evidence is in the record uncontradicted and clear that Roby bought that judgment with his own money, and that Charles W. Colehour never contributed a penny (Charles W. Colehour so testified on cross-examination), and that there was no such arrangement. The sheriff's deed to Roby bearing date Dec. 16, 1887, was set up in Roby's answer and read in evidence.)

(21st.) That on or about the 1st day of May, 1879, said Roby was not satisfied with said William H. Colehour and not willing that he should act as trustee, claiming that he had not the requisite experience and ability and standing, that as the whole management of said property was being conducted by your orator, he ought to act as trustee instead of William H. Colehour, and suggested that William H. Colehour deed said land to your orator, that your orator suggested said Roby's wishes in the premises to said William H. Colehour; and that William H. Colehour made, executed and delivered to your orator a deed conveying to him the legal title to said land; that said Roby advised that it better not be at that time recorded, and that your orator held the said deed and forgot that it was not recorded, and supposed it was until he learned it had not been, on or about the 14th day of July, 1888, when he recorded the same. But your orator says that said Roby well knew of the execution and delivery of said deed, and approved of the same; and that *from its date your orator acted as the trustee of said land in place of said William H. Colehour;* and that your orator took possession of the same except so far as it had been sold, and fenced nearly all of the unsold portions of the same, and has held possession of the same to the present time.

(*Note:* The above is in *haec verba* the only averment of that deed in the bill. The deed so averred could convey no beneficial estate to the grantee. *Lessee of Smith* v. *McCann*, 24 How., 406.)

That by representing that he had got by judgment sales, and owned, all orator's interest in said lands, and by false reading of a deed about January 1, 1887,

Roby procured William H. Colehour and his wife to convey by deed, signed, acknowledged and delivered all said land to him (Roby); which deed in fact conveyed the interest of your orator (Charles W. Colehour.)

(*Note*: this deed was proved to be fairly given January 6, 1887, in consideration of an admitted claim for $86,000, and a large moving consideration at that time.)

That (22d) after the mortgagees refused to give releases (A. D. 1878), on the lots sold, Roby, Wm. H. and orator took account and found that Roby had in his hands of notes and securities belonging to the trust at least

$15,000, and it was agreed that neither owed the other anything, and that Roby should collect and account for said securities.

(*Note:* the evidence showed and decree found that there was no such accounting or settlement; and the evidence showed that Roby had no such securities.)

That (23d), in 1886, Roby, as the attorney of orator, and Wm. H. Colehour advised a forcible detainer suit by Wm. H. Colehour for part of the land, and in executing writ of restitution irregularities were committed for which the defendant's wife got judgment against Wm. H. and C. W. Colehour for $1,500, and at the time of the recovery of such judgment, Roby agreed that as said judgment had resulted from an attempt to recover possession of said land, by proceedings advised by him, and as said forcible detainer suit was brought for the benefit of all interested therein, he would pay one-quarter of the same.

" That your orator has, from the date of his first ar-
" rangement with said Roby, and from the date of the
" said declaration of trust of *August 16, 1873*, in all re-
" spects, and to the best of his ability, honestly en-
" deavored to carry out, and promote the best interests
" of the equitable owners of said land; and that said
" Roby, taking advantage of your orator's financial posi-
" tion and confidential relations, as his attorney, resulting
" from his position with your orator, misled, and induced
" him to consent to said execution sales, your orator be-
" lieving that said Roby would in good faith, carry out
" his said promises and agreements.

" (24th.) Your orator alleges and charges, that the
" said Roby has not carried out his *said agreement* with
" your orator, *on which his rights, if any, in said land, are*
" *based;* that he has not in good faith defended said fore-
" closure suit, and endeavored to protect the rights of
" your orator and said William H. Colehour in said land;
" but contrary to his said agreements and his obligations
" as the attorney of your orator and said William H.
" Colehour, and in violation of his duty as one jointly
" interested with your orator and William H. Colehour
" in said land, has deliberately and intentionally, and by

"fraud as aforesaid, attempted to deprive them of their "said rights in said land, and hence has forfeited all his "rights, title and interest therein, and holds his said titles "so acquired by him as the trustee of your orator and "said William H. Colehour.

"(25th.) That from the year 1873 until the latter "part of 1889, he had believed that said Roby was work- "ing with him in good faith to carry out *the original in-* "*tentions* entertained by your orator, said Roby and Will- "iam H. Colehour to defend said foreclosure suit, and "protect said property, and to protect the equity of re- "demption therein, and sell and dispose of the same to "the best advantage and divide the net proceeds, one- "half to your orator, one-quarter each to Roby and "William H. Colehour; but your orator alleges that said "Roby now claims that neither your orator nor the said "William H. Colehour has any right, title or interest in said "property, and claims the same as his own, subject only "to the amount due thereon to the said Clarkes; and, to "defraud and injure your orator, *has filed his three bills* "*in this court*, to compel your orator and James E. "Clarke and Jared M. Clarke, who hold the title to por- "tions of said land for the use of the legal owners thereof, "to deed said portions of land to him. But your orator "says that the said Clarkes have deeded to him titles "conveyed to them, and that he holds the same subject "to the order ofthis court."

That (26th) there was sold December 30, 1889, and January 29, 1890, by foreclosure proceedings on said purchase money mortgage all said 406 acres, in which Roby, orator, or Wm. H. Colehour, have any interest; that the land is worth $250,000 more than the amount of the sale, and that the land should be conveyed to a receiver.

That (27th) neither Roby, orator, or Wm. H. Colehour have the means to redeem, but if Roby, orator, and Wm. H. deed to a receiver he can make perfect title and redeem.

That orator has demanded of Roby to convey his title to said land to orator, to be held as trustee for those ben-

eficially interested in said land, and that he (Roby) has absolutely refused so to do, and claims that he is the sole owner of the same.

That (28th) a list of the lands sold on said foreclosure is appended.

That (29th) orator has offered to account with Roby and allow to him everything he is entitled to.

By amendment May 14, 1890, Charles W. Colehour addded to his bill that between the years 1874 and 1877 William H. Colehour conveyed lots named to Lender, who agreed to hold the ti le under the same trust Wm. H. Colehour held by.

That November 23, 1886, Roby represented to Lender that he owned the entire equi y in the trust estate, and on that day Lender conveyed to Roby all said lots, by deed; which deed was procured by Roby in fraud of the rights *of your orator*, and ought to be held void and of no effect *as to your orator*, and to be conveyed to a receiver to be appointed by the court.

June 12, 1890, Charles W. Colehour added by amendment the averment, "that the defendant, Roby, has produced an ins'rument, of which the following is a copy:

"I William H. Colehour, being the owner in fee of the south half of section eight and part of the north-east quarter of same, and of the north-east three-quarters of Section 17, all in T. 37 N., R. 15 E. 3rd P. M., Cook County, as conveyed me by deed of Henry F., Robert D. Harriet S. and Sarah J. Clarke, dated July 18, 1871, and recorded August 2, 1871, in Cook County, Ills., do hereby acknowledge that after the payment of all sums of money due on any notes of mine secured upon said land the payment of all interest payable on account of said notes, the payment of all moneys advanced on account of any development of said land, or on account of any industry on or beneficial to said land, and the payment of all sums of money advanced by C. W. Colehour and Edward Roby, or hereafter to be advanced on account of anything pertaining to said land, then Edward Roby shall be entitled to the one-fourth part of the net profits of said land, Chas. W Colehour shall be entitled to the one-half of the net profits of said land, and I shall shall be entitled to the one-fourth part of the net profits of said land.

This shall apply to the heirs, executors or administrators of any and all of the parties above mentioned.

But no assignment of any interest shall be made without the written consent of all the parties hereto first obtained.

And this division of interest is in consideration of money advanced by the above mentioned Roby and C. W. Colehour on behalf of said land; and subject to any agreement of mine with reference to said land heretofore made by me concerning any division into lots, conveyances, management thereof, or of any indebtedness incurred in behalf of said land.

And I hereby make, constitute and appoint Chas. W. Colehour, my true and lawful attorney in fact, to sell said lands by lot or block as he may deem best, and to give deeds for the same, with proper notes back for deferred payments; and to do this shall have full power to sign my name to any deed or instrument, and acknowledge the same, in as full a manner as I could do myself, with Edward Roby as his substitute; and I do hereby confirm all acts done by my attorney in fact and also his substitute in this behalf as my acts and as binding on me or my heirs, executors or administrators.

WILLIAM H. COLEHOUR. [SEAL.]"

And your orator further states that said Roby claims said instrument was made, executed and delivered by the said Wm. H. Colehour, and that the same expresses the contract and agreement of the parties, whereas your orator claims and insists that said instrument was never delivered, and never became operative, and does not express the agreement between the parties; *but that the instrument bearing date August 16, 1873*, copied in orator's original bill is the true and only declaration of trust executed and delivered by said Wm. H. Colehour for the benefit of said Roby; and that the same was and is the only instrument agreed on between your orator and said Wm. H. Colehour and Edward Roby, and that the same contains the true agreement between the parties and declaration of trust concerning the lands therein described.

And having amended his bill as aforesaid your orator prays relief, the premises considered, as in and by his said bill he has already prayed.

Thus the amendments were to the stating part only, the PRAYER FOR RELIEF remaining as before:

(1.) For summons to answer without oath.

(2.) That the deed from Wm. H. Colehour to Roby recorded in Book 1,971 of Records, pg. 529, be declared null and void and set aside as a cloud on the title of orator and said Wm. H. Colehour.

(*Note.* This is the deed from Wm. H. Colehour and wife to Edward Roby, dated January 6, 1887, and delivered January 12. There was another deed of said date from Wm. H. alone, assigning all notes, etc.)

(3.) That your honor grant to your orator an injunction restraining Roby from selling or conveying any part of the lots or interfering with the title thereto.

(4.) That receiver be appointed and that Roby, Wm. H. Colehour and orator be required to convey to him.

(5.) That orator and Wm. H. Colehour be decreed

to be the owners of the equity of redemption in said lands.

(6.) That orator may have such other and further relief as shall seem meet.

By answer William H. Colehour admitted the bill, paragraph by paragraph, and united *in the prayer of said bill.*

The answer of Edward Roby raises *the federal question.*

It is true that it averred that Sept. 22, 1876, Charles W. Colehour sold and for a valuable and sufficient consideration and by deed conveyed, quit claimed and released to Wm. H. Colehour all his right, title and interest in the land in question, and thereafter said Charles W. Colehour had no right, title or interest in or claim upon said lands or any part thereof.

The deed read in evidence appears to be a mortgage to secure William H. Colehour for indorsing Charles W. Colehour's note for $20,000.

Had the averment been true it would have formed a bar to all Charles W. Colehour's claims on the contract of May 29, 1873, for $5,000 a year; *it would also have established that all co-tenancy, partnership or common interest between Roby and Charles W. Colehour ceased Sept. 22, 1876.*

But Charles W. Colehour put it in issue by replication, and continued to claim his interest under his bill as acquired in or before 1873, and uninterrupted *from that day to this;* even averring by the 22d division of his bill that he as owner of an interest in the trust in William H. Colehour settled, and accounted with him and Roby thereon in 1878; and also claiming that $5,000 a year, for which he got the writing dated May 29, 1873, inserted in haec verba in the decree.

The answer set up Charles W. Colehour's bankruptcy *in bar of the bill* in the following words:

"On the 30th day of August, A. D. 1878, said Charles "W. Colehour filed his petition in bankruptcy in the Dis- "trict Court of the United States, in and for the North- "ern District of Illinois, alleging that he was indebted in "large sums aggregating $819,675.45 or thereabouts, al- "leging that this defendant was one of his creditors, alleg- "ing that some nineteen other lawyers were his creditors "for legal services rendered to him in the years 1873, "1874, 1875, 1876, 1877 and 1878, alleging that he was "a bankrupt, and praying that he might be adjudged "to be a bankrupt; and thereafter he was by the said "Court declared and adjudged a bankrupt, and all his "property and interests of whatsoever name or nature "were, according to the course and practice of such "court, duly conveyed to Bradford Hancock, Esq., who "was appointed his assignee in bankruptcy; and there- "after said Charles W. Colehour had no right or interest "therein.

"Said Charles W. Colehour, having in 1876, for a "sufficient and valuable consideration, conveyed all his "interest in and to said land and all claims thereon to said "William H. Colehour, and having no interest in said "land or the proceeds thereof, or in the title in said Will- "iam H. Colehour, did not mention the same, or any part "thereof, in his inventory filed in said District Court of "the United States, in such proceeding in bankruptcy; "and said Charles W. Colehour had not at said date, to "wit: on the 30th day of August, A. D. 1878, any right, "title or interest in or to, or claim on said lands or any of "the proceeds thereof."

The following is the deed of Sept. 22, 1886, which is in evidence in the record:

In consideration of the indorsement of my notes for twenty thousand dollars and one dollar to me in hand paid, the performance of both of which are hereby acknowledged as done by Wm. H. Colehour, I hereby quitclaim to Wm. H. Colehour all my right, title and interest in and to the south half and N. E. Quarter of Section Eight; and Section Seventeen, both in Township 37, R. 15, E. 3d P. M., Cook Co., Ills.

September 22d, 1876.

CHARLES W. COLEHOUR. [SEAL.]

It was mentioned is the decree as follows:

"That on the 22d day of September, 1876, Charles W. Colehour quitclaimed, released and conveyed to William H. Colehour all his right, title and interest in and to the said premises."

All the evidence in the record shows that this was a mortgage and that William H. never paid any of the endorsements.

The answer of Roby set up the assignment and discharge of Roby in bankruptcy, *in bar of the bill* as follows:

" And this defendant further shows that, on the 31st " day of August, A. D. 1878, this defendant filed his " petition in bankruptcy in the District court of the " United States for the Northern district of Illinois, and " therein scheduled as part of his assets his said inter- " est arising under said declaration of trust by said " William H. Colehour to William Hansbrough, and also " said declaration of trust by said William H. Colehour to " this defendant; and such proceedings were thereupon " had that this defendant was duly adjudged bankrupt, " and all his assets were conveyed to his assignee in bank- " ruptcy, to wit: on the 7th day of September, A. D. 1878; " and that but one claim and that for a small, amount was " proved against the estate of this defendant in bankruptcy; " and that thereafter, and on the 23d day of November, A. " D. 1880, this defendant was by said District court duly dis- " charged from all debts and claims provable against his " estate, and which existed on the 31st day of August, " 1878.

" And thereafter, to wit: on the 4th day of February, " A. D. 1882, the assignee in bankruptcy of this defend- " ant sold the assets of this defendant, including all his " interest derived under the said declarations of trust, unto " this defendant, and duly assigned and conveyed the " same, including all interest in the said lands embraced " in said declarations of trust from said William H. Cole- " hour to this defendant, and said sale was duly ap- " proved and made absolute by the said District court."

The proceedings in Bankruptcy so averred were proved by exemplifications which are in the record.

The proof is absolute that Charles W. Colehour filed his petition in bankruptcy August 30th, 1878, showing himself indebted $819,675.45, and scheduling but fifty dollars assets in wearing apparel which he claimed as exempt, and thirty dollars which he paid to file his petition; that he was duly adjudged bankrupt; and all his assets *were conveyed* to his assignee in bankruptcy, though he had scheduled none.

The proof is also absolute that Roby filed his petition August 31, 1878, was duly adjudged Sept 7, 1878, and his estate assigned to his assignee; that he was discharged Nov. 23, 1880; and that on Feb. 4, 1882, the assignee in bankruptcy sold to him the interest he had had in the land in question on August 31, 1878, and also all claims he then had on Wm. H. Colehour, the trustee, or on Charles W. Colehour.

Notwithstanding this proof in the record, completely made and entirely unquestioned, *the court of Illinois upon this bill* took from Roby the land which he bought of Landis in 1884, also that which he bought of George F. Harding in 1888; also that which he bought at the sheriff's sale in Sept. 1886, on the judgment of Crane Brothers Manufacturing Co. which he had prosecuted against the Colehours from August, 1879, and the interests conveyed by the deed given by William H. Colehour to Roby, January 6, 1887.

The judgment of McCoy v. C. W. Colehour was June 4, 1878.

August 30, 1878, Charles W. Colehour filed his petition in bankruptcy.

August 31, 1878, Roby filed his petition in bankruptcy.

October 3, 1878, Horton recovered judgment vs. Wm. H. and C. W. Colehour.

May 1, 1879, William H. Colehour pretended to substitute Charles W. as trustee in place of himself.

Sept. 24, 1879, Crane Bros. Mfg. Co. recovered judgment vs. W. H. and C. W. Colehour.

Nov. 23, 1880, Roby was discharged in Bankruptcy.

Feb. 4, 1882, the assignee in Bankruptcy of Roby sold and conveyed all interest Roby had in this land on Aug. 31, 1878, and also all claims Roby then had against Wm. H. Colehour, the trustee, and the lands in his hands.

July 31, 1882, over 165 acres of the land in question was sold on the Horton judgment to Landis, *a stranger*, for $3,250.00 and was not redeemed.

Nov. 1, 1883, the sheriff's deed was issued to Landis, conveying to him, *an entire stranger*, that part of the land.

March 26, 1884, Roby bought that land from Landis and received his deed.

May 23, 1885, all interest that Charles W. Colehour had in the land on June 4, 1878, was sold on the McCoy judgment to George F. Harding, and not being redeemed, it was, on Oct. 21, 1886, conveyed by the sheriff to George F. Harding, *an entire stranger*.

February 8, 1888, George F. Harding conveyed that title (and another) to Roby for $4,721.00.

Sept. 14, 1886, a long list of the lots were sold on the Crane Judgment to Roby (who was the plaintiff's attorney) and they, not being redeemed, were on Dec. 17, 1887, conveyed to Roby, by the sheriff.

January 6, 1887, William H. Colehour in consideration of the release of a debt of $86,000 and upwards, and a large moving consideration, quitclaimed all interest in the land to Roby.

Now take up the land which Roby bought of Landis.

Whatever interest C. W. Colehour had August 30, 1878, passed to his assignee.

The Judgment was entered Oct. 3, 1878. Roby was a stranger to the property at that time. All the interests Roby had August 31, 1878, passed to his assignee. (Ibid.) The bill does not suggest that Roby was liable to contribution. If it had, his discharge in bankruptcy was a perfect bar.

May 1, 1879, by a deed *without consideration* William H. Colehour tried to substitute Charles W. Colehour the bankrupt in place of himself as trustee for the assignees in bankruptcy.

Roby's answer states and the proof shows that William H. Colehour had used $234,000 of the proceeds of lots sold and conveyed by him, and the land in his hands was held for Roby's assignee for a large share of that, as well as for one-fourth of the land left. The land in Wm. H. Colehour was also held for any share Charles might have had in this $234,000, as well as in the land left. The trust was one of discretion. Wm. H. might sell and convey and discharge the purchasers. The deed attempting to impose a new trustee on Roby's assignee without his knowledge or consent was void; (1 *Perry on Trusts*, Sec., 287–292; 401, 402; *Lewin on Trusts*, 257, (12); *Wormley* v. *Wormley*, 8 Wheat., pp. 438–9.)

Especially was it void when the new trustee was $819,000 insolvent, was undischarged, and Roby was (for his assignee and as the attorney of the Crane Bros. Mfg. Co.) prosecuting claims against him (Charles W. Colehour), and opposing his discharge. (1 *Perry on Trusts*, Sec. 292, and cases cited.)

July 31, 1882, over 165 acres of the land in question was sold on the Horton judgment to *Roland R. Landis, a perfect stranger*, for $3,250.00, which he paid to the sheriff, and the land not having been redeemed, the sheriff conveyed the land to him Nov. 1, 1883.

Roby's assignee in bankruptcy had no notice of the deed of Wm. H. Colehour to Charles W. Colehour, dated May 1, 1879, and Roby had no notice of it till nearly ten years later.

The evidence is that Roby knew nothing of the Horton judgment or sale on it to Landis until, in March, 1884, Landis applied to Roby to buy the land of him; and Roby bought it and paid his own money for it.

The Illinois Court has held, *under above bill*, that Roby bought and holds one undivided half of that land in trust for Charles W. Colehour.

Turn back to the bill (the 18th division); it alleges that Roby had in his possession notes belonging to Charles W. and William H. Colehour, and offered to buy of Landis, and hold the title in trust. But the record shows that Roby had no notes of theirs, that he did not offer to buy, or promise to buy and hold in trust, that there was no

writing, and that any such agreement as a new matter would be void under the statute of frauds. The testimony of Charles Colehour was that *after* Roby's purchase he promised *orally* to hold it in trust. That was denied by Roby. *The bill does not allege any consideration* for any such offer or promise or trust. Hence the averment is of nudum pactum, except as the whole scope of the bill is that Charles W. Colehour and Edward Roby were jointly interested in the land *at all times* from 1873 to that date, that Roby incurred obligations to Charles Colehour as co-tenant which subsisted *against* Roby all the time from 1873 till Roby bought of Landis, and subsisted *in Charles W. Colehour* till that date.

It seems clear that if Charles Colehour parted with alt interest in and claim on the land Sept. 22, 1876, he gol nothing after that time. If Sept. 22, 1876, he released to William H. Colehour, that united the legal and equitable title; and thenceforth William H. Colehour was trustee for Roby *only;* the amount applied to his own use by William H. Colehour might use up the whole land and leave Roby entitled to what was left or the entire proceeds thereof, and *the trust in favor of Roby* and oj his assignee in bankruptcy *was in the whole land.* The averment of the bill (21st) is not that Charles bought, or paid any consideration for or received anything in his own right in 1879, but that he succeeded William H. Colehour as trustee.

Again: the deed of Sept. 22, 1876, appears to be a mortgage; and the evidence in the record given by Colehour *to sustain his replication* denying that he conveyed Sept. 22, 1876, proves, that the scrap of a deed of that date was only a mortgage, and that Charles retained his interests till August 30, 1878, when it passed to his assignee in bankruptcy. If the deed to Charles of May 1, 1879, passed any title to him it was as trustee for the assignee in bankruptcy ot Roby and the Assignee in Bankruptcy of Charles W. Colehour.

Where, then can Charles W. Colehour sue on a claim that subsisted, if at all, in his assignee in bankruptcy, and to which he is a stranger? And how can he maintain the suit against Roby who parted with all his interests to his assignee in bankruptcy and was discharged from all his obligations?

Is it not clear that the bill could not be maintained against Roby for lands which Roby bought from an entire stranger, who had bought them with his own money in good faith and owned them for months?

Even the opposite counsel have not said that *it is so clear* that the assignment in bankruptcy of Charles W. Colehour did not divest him of all right to sue and vest his claims and rights in his assignee in bankruptcy that this court ought *so to adjudge*, against Roby's claim, without giving him a hearing on the merits. Neither have they said that *it is so clear* that the discharge of Roby in bankruptcy has not released him from all obligations incurred in 1873, on which to hang a trust in 1884, when he happened to buy land *in which the Colehours once had an interest*, from a man who had owned it for months, that this court ought *so to adjudge*, without allowing Roby a hearing or the benefit of counsel on that point. Neither have the counsel said that *it is so clear* that a trustee (with discretion, and power to sell and discharge purchasers) already charged with an immense amount of proceeds to account for, can assign his trust to an irresponsible bankrupt, and substitute him as trustee for an assignee in bankruptcy, and for the purchaser from such assignee, without the knowledge or consent of either; that this court *should so adjudge* without hearing counsel on the merits. On the contrary, the counsel argue the merits.

We think the opposite is so clear, on each of these propositions, that this court must hold Charles Colehour could not sue, that Roby could not be held because of his discharge, that the pretended substitution of trustee was void as to Roby's assignee in bankruptcy, and as to the purchaser from that assignee.

Illinois Revised Statutes, Ch. 22, entitled CHANCERY.

SEC. 30. Any defendant may, after filing his answer, exhibit and file his cross-bill, and call upon the complainant to file his answer thereto, in such time as may be prescribed by the court.

SEC. 31. It shall not be necessary to recite in a cross-bill any of the pleadings or proceedings in the case in which it is filed;

and it shall not be necessary to pray process except against new parties.

SEC. 34. Where it is necessary for the defendant to bring a new party before the court, he shall state it in his cross-bill and a summons shall be issued and other proceedings had as in case of other defendants.

The above bill of Charles W. Colehour was a cross-bill to the three cases mentioned in the 25th division thereof which were tried with it.

In those cases Charles W. Colehour set up for his defense the above printed declaration of trust *dated August 16, 1873*, and the above mentionted deed *dated May 1, 1879*. Both were set ont in haec verba in his answers. The following is a copy of the deed of May 1, 1879.

Deed of May 1, 1879.

Wm. H. Colehour to Charles W. Colehour.

Know all men by these presents that I, WILLIAM H. COLEHOUR (a bachelor), do *in consideration of one dollar* to me in hand paid by CHARLES W. COLEHOUR of the second part, grant, bargain and sell to CHARLES W. COLEHOUR the following described land, to wit:

The North half of the South East quarter and the North East quarter of Section 17, T. 37, N., R. 15, E. 3d P. M.

And the following lots and blocks in Ironworkers' Addition to South Chicago, being a subn. of the South half of fractional Sec. 8, T. 37, N. R. 15 E. 3d P. M., Cook County, Illinois.

Lots 1 to 18, Block 1; Lots 1 to 23, Bk. 2; Lots 4 & 5, Bk. 3; Lots 1, 2, 10, 11, 12, Bk. 4; Lots 1 to 11, Bk. 5; Lot 1, Bk. 7; Lot 1, Bk. 8; Bk. 9; Lots 5 to 14 and 28 to 46, Bk. 10; Lots 40, 41 and 44 to 48, Bk. 11; Lots 47 & 48, Bk. 12; Lots 6 to 48, Bk. 15; Lots 7 to 22 and 25 to 48, Bk. 16; Lots 6 to 41, Bk. 17; Lots 4 to 33, Bk. 18; Lots 1 to 32, Bk. 19; Lots 8 to 30, Bk. 20; Lots 1 to 55, Bk. 22; Lots 1 to 43, Bk. 23; Bk. 24, entire; Lots 1 to 21 and 25 to 48, Bk. 25; Lots 1 to 48, Bk. 26; Lots 1 to 24 and 29 to 39, Bk. 27; Lots 5, 6, 7, Bk. 28; Lots 5, 6, 7, 8, 21, 22, Bk. 29; Lots 8, 9, 10, 11, 18, 19, 20, 25, 26 and 27 to 33 and 45 to 48, Bk. 30; Bk. 31, entire; Lots 10 and 11 and 25 to 48, Bk. 32; Lots 8, 15, 16, 17 and 18 to 29 and 40, 41 and 47, Bk. 33; Lots 2 to 7 and 18 to 32, 39, 42, 43 & 44, Bk. 34; Lots 6, 13, 20, 21, 22, 23, 24 and 25 to 30 and 42, 43 & 44, Bk. 35; Lots 1 to 46, Bk. 36; Block 37, entire; Lots 5 to 48, Bk. 38; Bk. 39, entire; Bk. 40, entire; Bk. 41, entire; Bk. 42, entire; Bk. 43, entire; Bk. 44, entire; Bk, 45, entire, and Bk. 46, entire.

Also the following piece of land situate in the county of Cook

and State of Illinois: Commencing at the point of intersection of the Lake Shore and Michigan right of way, as located July 18th, 1871, that is the center line of said right of way, with the east and west line of the center of Sec. 8, T. 37, N., R. 15 E. 3d P. M. and running thence on a course North 30° and 30′ East, 20 chains and 25 links, more or less, to Lake Michigan; thence along the shore of Lake Michigan, on a course South 25° and 30′, more or less, East to the intersection of the State line; thence South along the State line to a point 50 feet North of the center of said right of way; thence on a course northwesterly along said right of way to the point of beginning; all in fractional section 8, T. 37, N., R. 15, E. 3d P. M., Cook County, Illinois.

This deed is made and delivered subject to a declaration of trust made by me August 16th, 1873. And the above described land is conveyed subject to the terms of said trust, the original of which declaration of trust is in the possession of Charles W. Colehour, grantee hereof.

I also grant, bargain and sell to Charles W. Colehour the West ½ of North-West quarter of Sec. 17, T. 37, N., R. 15 E. 3d P. M., Cook county, Illinois; subject to my declaration of trust of date Feb. 22d, A. D. 1876, held by Charles W. Colehour.

In witness whereof I have hereunto set my hand and seal this 1st day of May, A. D. 1879.

WILLIAM H. COLEHOUR. [SEAL.]

Recorded July 14, 1888.

William H. Colehour filed a cross-bill, in which he showed a judgment of McCoy v. William H. Colehour, entered June 4, 1878, for $3,700.00, sale thereon of divers lots to George F. Harding (Evidence shows May 23, 1885, for $3,550) and the deed by Harding to Roby of Feb. 8, 1888, for $4,721, mentioned in Charles W. Colehour's bill. He also showed that he gave two deeds to Roby January 6, 1887, one conveying all his interest in the land, and the other assigning all equitable interests and notes, etc.

Assailing them he alleged that they were forged, and misread, etc., though the record shows that they were given in satisfaction of a debt claimed by Roby for above $86,000, and that Roby gave farther consideration.

The substance and gravamen of the equity claimed was that Roby had been jointly interested with both Colehours in the land from 1873, and thereby was disabled to purchase for himself.

The answer to the bill of Charles W. stood as the answer to this cross-bill.

A party cannot be permitted to defeat the jurisdiction of this court by making averments which he does not prove. (Authorities post.)

It seems that this court will sometimes look into the State Reports to see whether the point here made to give this court jurisdiction was there taken, and perhaps to satisfy curiosity on other points. (*Klinger* v. *Missouri*, 13 Wallace, p. 261.) The opinion of the Chancellor who tried these cases was referred to by the per Curiam opinion of the Supreme Court of Illinois, and is reported in 135 Ill., pp. 323–333. *Of course it does not prove anything*, but some of its observations are very pertinent to the record, namely:

Page 332. "I have disposed of this case, as will be observed, without any finding as to the actual or intentional fraud on the part of Roby, and it gives me pleasure to be able to state that the gross charges of fraud (among others as to his having stolen the declaration of trust from its place of deposit, that the deed of W. H. Colehour to him was a forgery, and that he offered to betray his client, Clark, in 1872 or 1873) are not proven by the evidence in the case. *Several of the charges against him were evidently maliciously made, and with intent to injure him professionally.*"

Page 332: "As I have stated, Roby, not from any express retainer, but from the relation *growing out of the business of the trust or joint adventure*, had for years occupied the position of attorney toward both the Colehours."

Page 327: Referring to claims of Roby made in 1878 and thenceforward: "As stated, he claims the Colehours embezzled moneys derived from sales to an amount sufficient to extinguish their interests and leave him sole owner of whatever remains, if any, of the net profits. That cannot here be determined now, and is a question to be determined upon an accounting."

(Note: Whatever interest Roby so claimed he derived by purchase from the assignee in bankruptcy.)

Page 326: "It appears that Complainant (Charles W. Colehour) gave very considerable time and attention to selling lots in the subdivision made of the land and the making of the necessary street improvements *for a number of years*, at least *until 1878*, when the holders of the Clark (purchase money) mortgage ceased to release lots from the mortgage as they had been doing."

Pages 324–5: "One of the strongly contested points in the case is, as to which is the actual agreement between the parties—that contained in the declaration of trust *dated August 16, 1873*, produced by complainant, *or that* without date *produced by Roby*—both signed by William H. Colehour, and both being made at or shortly after the purchase from Hansbrough.

* * * * *

The evidence, to my mind, shows, that the instrument produced by Roby was the one last drawn, that the minds of the parties did not agree on the other. I am of opinion that it was agreed to by all parties, and delivered to Roby, as containing the true declaration of the interests of the parties. It must be so treated and held."

Page 325: "It appears that a quitclaim deed was made September, 1876, by C. W. Colehour to William H. Colehour, of all his interest in the lands. *No consent of Roby was given thereto.*

BANKRUPTCY PROCEEDINGS. Page 325. It also appears that in 1878 *C. W. Colehour filed his petition in Bankruptcy* in the United States Court in this district, and did not schedule the said land or any interest in the same, or the net profits aforesaid.

"Roby, about the same time, went into bankruptcy, and scheduled his interest, and bought the same back from his assignee, for a nominal consideration."

Page 330: "The bill (of Charles W. Colehour) makes an attack upon the deed by Wm. H. Colehour and wife to Edward Roby, made in 1887, and asks that it be delared null and void and of no effect, and set aside as a cloud upon the title of complainant and said William H. Colehour. This complainant cannot obtain all the relief prayed * * He is entitled to a decree that the conveyance of 1887 to Roby is void and of no effect, so far as it affects *complainant's* (Charles W. Colehour's) *interests in said land, or under the said declaration of trust;* because, first, Roby had notice of *the deed of W. H. Colehour to C. W. Colehour of May 1, 1879*, conveying the legal title of the land subject to the trust; and, second, *because so far as the right to one-half the profits is concerned, arising out of the declaration of trust, made in 1873*, such right is a mere chose in action, and transferable only subject *to the equities of the original parties thereto.*

Even if the deed of May 1, 1879, had never been made, Roby could only hold the land under the deed of 1887, subject to complainant's right to one-half the net profits, under the declaration of trust."

Pages 325–6. The chancellor refused to find that Roby knew of the deed of May 1, 1879, when it bore date, but would find only that Roby had notice of it before the deed of Wm. H. Colehour to him of January 6, 1887, was made.

The evidence in the record, as we understand it, clearly demonstrates that the decision must have been according to the matter above in italics:—Admitting the bankruptcy proceedings of Charles W. Colehour, admitting the bankruptcy proceedings of Roby, the decision was, that Charles Colehour could sue in his original right of 1873 (though no deed had been made in 1879), and neither the assignment in bankruptcy of all Charles W. Colehour's assets, August 30, 1878, would divest him of the right, nor the discharge of Roby in bankruptcy would release him from the obligations incurred by him in 1873.

As shown above by the authorities, that deed of May 1, 1879, as alleged in the 21st division of Charles W. Colehour's bill was void.

In the condition of this record, unprinted and embracing several thousand pages, we cannot be called suddenly under the rules of the court to argue the merits of the case.

We understand *the record* to show conclusively that *not an essential averment* in the bills of either Colehour, or in the answers of Charles Colehour to Roby's three bills was proved, except such as were proved by the written documents above copied and the two deeds of Wm. H. Colehour to Roby; and *that every essential fact alleged by Roby's answer was proved* except that the deed of Sept. 22, 1876, did not convey Charles Colehour's interest, except in mortgage, as security.

We understand that the record distinctly shows that about July 1, 1877, William H. Colehour conveyed a large parcel of the land (worth some $35,000) to an entire stranger, Jared Myers Clark, without consideration, and the deed was put on record. That July 2d this Clark conveyed the land back to William H. Colehour. That Charles Colehour possessed himself of the deed,

erased William's name and forged into it the name of his own (Charles') wife, and kept it secret. That about the same time he took a deed of the same land from this Clark with the grantee's name in blank, and after some months filled in the name of his daughter 11 years old, had it acknowledged by Clark, and kept it secret. (The decree finds most of these things.) We understand that the record distinctly shows that Roby examined the indexes to the public records in December, 1877, and January, 1878, and discovered that Wm. H. Colehour had conveyed lands out of the trust estate for an aggregate of $234,000, and had not paid but $30,000 on the incumbrance for purchase money. That about January 16. 1878, Wm. H. Colehour conveyed about $50,000 worth of the land to a stranger without consideration, and upon these discoveries Roby quarreled with the Colehours; and fought them afterwards for more than seven years.

That as a part of the quarrel, on Feb. 4, 1878, the Colehours dismissed Roby out of a pending suit in chancery in which he was their solicitor, upon notice and by motion in court, and substituted another attorney. That afterwards Roby took retainers against them, and from 1878 to 1887 was constantly prosecuting suits against them with great severity; only coming together with them in one case where their interests as to part of the issues were arrayed on the same side of the case, they appearing by Mr. Goudy and Mr. Monroe, and Roby prosecuting cross-bills against them.

We understand the proof to be absolute and unquestioned that Mr. Goudy was the general and regular counsel of the Colehours as to all matters touching this land from 1871 till the decree below, and that Roby had no position of attorney for them except as it was part of the joint interest, co-tenancy or partnership in this land, and to protect Roby's interest in the land.

In short, the record shows that this suit could not be maintained by Charles W. Colehour without holding that he was never divested of his co-tenancy with Roby from 1873 to the date of the suit by *his proceedings in bankruptcy* or otherwise; that the decree establishing a trust in Roby's purchases in favor of Charles W. Colehour and William H. Colehour could never have been reached

without deciding that the assignment in bankruptcy by Roby was inoperative to dissolve a partnership or co-tenancy; and that the discharge in bankruptcy was inoperative to release him from obligations incurred as such partner or co-tenant.

MARK: Roby's interest ceased August 31, 1878, and *for four years* was vested in his assignee in bankruptcy. Roby was discharged in 1880, and for two years more was entirely severed from all the estate and its obligations.

But counsel for defendants in error say, that when Roby bought of the assignee in bankruptcy in 1882, he did not take the property as another person would have done, but might be sued upon express or implied obligations of 1873; that the assignee in bankruptcy did not stand in the same relation to the assets that an administrator would have done; and that Roby purchasing from the assignee did not stand in the shoes of the assignee, or take the same estate and rights that any other person would have taken, had he been the purchaser instead of Roby.

A bankrupt is civiliter mortuus from the day on which he files his petition, and during the interval between the filing of the petition and the appointment of the assignee no assignment of his assets can be made.

Johnson v. Geisriter, 26 Ark., 44.
Barron v. Newberry, 1 Biss., 149.

This means that he is dead as to the control of his old property and contracts; *His assignee stands like an adminstrator in respect to these.* He is alive to acquire new property.

Carr v. Gale, 3 Woodbury & Minot, 38, p. 67.

A bankrupt may purchase his own assets after he is discharged.

Traer v. Clews, 115 U. S., pp. 528-542.
Phelps v. McDonald, 2 MacArthur, 376, pp. 386-7.
Arnold v. Leonard, 12 Smedes & M., 258.

When Roby purchased the property of the assignee in bankruptcy he took it entirely free from any equities or obligations which were extinguished by the bankruptcy. *Kingsbury* v. *Buckner*, 70 Ill., pp. 520-523.

Both questions are federal questions. The right of Charles W. Colehour to sue notwithstanding his bankruptcy, and the liability of Roby to be sued notwithstanding the dissolution of all joint interests by the bankruptcy of Charles W. Colehour, and by his own adjudication, etc., and notwithstanding his discharge, depend on the statute of the United States, and the effect to be given to the judgments and proceedings of the District Court of the United States.

Giles v. Little, 134 U. S., p. 649.
Dupasseur v. Rochereau, 21 Wal., p. 134.
C. L. S. Co. v. Butcher's Union, 120 U. S., p. 146.

Henry Clews bought of his assignee in bankruptcy $10,500 of declared dividends for one dollar. This court held:

A bankrupt after his adjudication in bankruptcy and surrender of his property, "is as much at liberty to pur- "chase, if he has the means, any of the property so sur- "rendered, as any other person. The policy of the "Bankrupt Act was,after taking from thebankrupt all his "property not exempt by law, to discharge him from his "debts and liabilities, and enable him to take a fresh "start. His subsequent earnings are his own. A bank- "rupt might often desire, out of the proceeds of his ex- "empted property, or, out of his means earned since his "bankruptcy to purchase property which he has surren- "dered to the assignee. This he might do; and there is "nothing in the letter or policy of the bankrupt act that "forbids his doing so" even before his discharge.

Traer v. *Clews*, 115 U. S., 528.

Where a defendant claims a privilege under a statute of the United States, and is denied by the highest court of a state, there is no doubt of the authority of the Supreme Court of the United States to revise the judgment.

Hill v. *Harding*, 107 U. S., 631.
Murray v. *Charleston*, 96 U. S., 432.
Furman v. *Nichol*, 8 Wall., 44.

The object of the statute, considered with the third article of the Constitution, proves that the statute was intended to give the Supreme Court the power of ren-

dering uniform the construction of the laws of the United States and the decisions upon *rights* or *titles*, claimed under those laws.

Mathews v. *Zane*, 4 Cranch, 382.

Const., Art. 3, Sec. 2: "The judicial power shall extend to all cases in law and equity arising under this "constitution and the laws of the United States," etc.

A case arises, within the meaning of the constitution, whenever any question respecting the constitution, laws or treaties of the United States has assumed such form that the judicial power is capable of acting on it. (*Osborn* v. *U. S. Bank*, 9 Wh., 819; *Jones* v. *Seward*, 41 Barb., 272; Curtis' Com., Sec. 7; *Ex Parte Milligan*, 4 Wall., 112, 114.) A case is said to arise under the constitution or laws of the United States whenever its correct decision depends on the construction of either. (*Cohens* v. *Virginia*, 6 Wh., 379.)

In the case of *Crowell* v. *Randall*, 10 Peters, 368, A. D. 1836, this court collated and reviewed all the cases on the subject of the jurisdiction of the Supreme court of the United States to review the judgments of the highest court of any state. See pages 392 to 398. The statement there made of several cases brings the case before us within the very terms of the act provided for such review. Thus the court cited *Martin* v. *Hunter*, 1 Wh., 305, 355, holding that the title of the defendant against which the state court had decided, was perfect and complete if it was perfected by the treaty of 1783, and that the United States Court had authority to examine into the whole record to decide on the legal validity of that title, and having so decided, the case then fell within the very terms of the act. So here Roby's title to the land he bought of Landis was perfect and complete if protected by the bankrupt act. If his obligations, incurred in 1873, caused that title to inure to the benefit of Charles W. Colehour, he was not protected by that act. He pleaded the bankruptcy proceedings in his answer, and the state court found them in the decree. The next case cited by Mr. Justice Story in *Crowell* v. *Randall* has application (10 Peters, 394–5) because "the state court must, under "the circumstances, have misconstrued the act of Con- "gress, or disregarded it, for otherwise it would not have

"given the judgment sought to be revised." "The "court were of opinion that *the act of Congress* COULD "NOT BE EVADED *by the omission to refer to it in the* "*judgment or to spread it on the record.*"

In the next case cited, the court sustained the jurisdiction because the record showed that the law of the United States must have been misconstrued or the decision could not have been made. (p. 396.) In another case it was said (p. 397): "It is sufficient, if upon the facts "stated, such question must have arisen and the judg- "ment of the state court would not have been what it is "if there had not been *a misconstruction* of some act of "Congress, or *a decision against the validity of the right,* "*title, privilege, or exemption set up under it.*"

In another it was said (p. 397–8): "It is sufficient if it "appears from the record that an act of Congress was "applicable to the case, and was misconstrued, or the "decision in the state court was against the privilege or "exemption specially set up under such a statute."

Armstrong v. *Treasurer*, 16 Peters, 281, we have already cited.

In *Bridge Proprietors* v. *Hoboken Land Co.*, 1 Wall., 116, the rules stated in *Armstrong* v. *The Treasurer*, (16 Peters, 285) were applied, and the jurisdiction sustained, because the pleadings claimed a right, upon the facts stated, and to determine the legal effect of the facts stated it was necessary to decide whether the statute recited contravened the constitution.

These rules were also applied in

Furman v. *Nichol*, 8 Wall., 44.

Murray v. *Charleston*, 96 U. S., 432.

In *Johnson* v. *Risk*, 137 U. S., p. 306–7, the court seems to have affirmed the rule that it would *look into the whole record to determine inferentially* whether the point giving jurisdiction to this court arose and was decided in the case.

It would seem to be the principle decided in a number of cases, and among them ex parte Milligan, that *a party* could not be permitted to defeat the jurisdiction of the Supreme Court of the United States by making averments which he did not prove; and the state court could not defeat that jurisdiction by wantonly mingling with its

decision on the main question in the case some other matter, so as to deprive the citizen of the protection afforded him by the constitution or the statutes of the United States, and at the same time deprive him of the right which the constitution and the statute has given to have the judgment of the state court reviewed upon the federal question by the Supreme Court of the United States.

Such cases as this are not without precedent.

The evidence in the record shows that when Roby made his purchase from Landis in 1884, and from Harding in 1888, and when he bought at the judgment sale on the Crane judgment in 1886, and obtained his sheriff's deed in 1887, the land was worth very little if anything above the old purchase money mortgage upon it; that it continued in that condition until the middle of 1889, within six months of the beginning of the suit, when it suddenly began to advance so that when the bill was filed it was worth $250,000 more than the incumbrance. This is the testimony of both Colehours and is not contradicted, that the property was substantially without value up to the establishment of certain manufacturing works in the vicinity in the middle or last of 1889; and immediately following the decree is an order increasing the appeal bond to $300 000 based on evidence produced by the Colehours that the land had become worth nearly *a million of dollars* above the mortgage. Such conditions induce speculative lawsuits, to take away what the law has given.

Where the assets consisted of a claim against the U. S. scheduled as worthless which was sold to the bankrupt for a nominal sum, and afterwards through unforeseen circumstances it became valuable on suit to deprive the bankrupt of the rise, the court held that the bankrupt has a perfect right to hold the property and benefit by the rise. *Phelps* v. *McDonald*, 2 MacArthur, 376.

In closing, we may safely say th t this case could not have been decided on any independent ground. The decree itself finds that Roby was not guilty of any actual or

intentional fraud. The pleadings show that the only claim that Roby was attorney made in the bills grew out of their averment of a joint relation in 1873. The record shows that Charles W. Colehour was an older and more experienced lawyer than Roby and that the only relation of attorney grew out of Roby's applying his legal abilities to his own rights and consulting with the Colehours and their regular attorneys about such questions as arose touching the land, and that the relation was only accessory to Roby's interest prior to his bankruptcy. That afterward he sued both Colehours in cross-bills touching the same land and sought to charge them with embezzlement in the marshaling of assets. It was only by the decision of the federal questions against Roby that his property could be taken from him at the moment when it seemed to have become of value.

That those questions arose and were deliberately decided against him, has been clinched and made certain by the solemn record made by the Supreme Court of Illinois.

We append the order, so made by that court, and a copy of the assignment of errors on the records in this court.

Before printing them we present a brief written by another counsel and presented to the undersigned before the certificate of federal question had been made by the Supreme Court of Illinois.

Pleadings.

The four suits were consolidated by the Circuit Court before trial.

In the first three suits, Roby sought to recover the legal title to the lands sued for, basing his suits on the assignment of the equitable rights made by Wm. H. Colehour, by deed dated January 6, 1887. Charles W. Colehour set up legal title in himself as trustee in each case for the execution of a trust created in 1873, alleging that he held the lands in trust, under a declaration of trust *dated Aug. 16, 1873,* of which he gives a copy in each case, and that he had been made trustee by a deed from Wm. H. Colehour, dated May 1, 1879, of which he gives

a copy in two cases, showing a nominal consideration, and that he took only as a *voluntary trustee* (Hill on Trustees, Bispham's Edition, *107; Young *v.* Peachy, 2 Atk., 256) to execute the trusts established by *that particular* instrument bearing date August 16, 1873, *and none other.* (Smith *v.* McCann, 24 How., 406–7; Gumbert's Appeal, 110 Pa., 501.)

The fourth case was in fact a cross-bill by Charles W. Colehour *v.* Roby and Wm. H. Colehour "to bring the whole matter in dispute completely before the court," and to obtain affirmative relief upon those two instruments. (*2 Daniell's Ch. Pr.*, p. 1,548, Ch. 34, § 1.)

The substance of Charles W. Colehour's cross-bill was

First: An averment that in 1873 Roby became jointly interested with the Colehours in the adventure of this land, by betraying his clients (the Clarks) and obligating himself to render service (as an attorney) to Wm. H. Colehour (the holder of the legal title) as the sole consideration for his interest, as expressed in the writing *dated Aug. 16, 1873;* and that *pursuant to that contract,* he acted as attorney for the Colehours; that when the foreclosure suit was begun Oct. 24, 1881, he repeated his assurances of 1873 that he could defeat that foreclosure, but did not defend that case for the Colehours as he had agreed.

The bill also averred that May 29, 1873, William H. Colehour by deed contracted with Charles W. Colehour for services at a price of $5,000 per year, secured by lien on the land; that Roby took his interest subject to that, and that from 1873 to 1878 Charles Colehour rendered the services agreed, and received only $1,500 or less per year (leaving the balance owing to him and secured on the land).

Second: That while Roby was so obligated to be attorney, and while he was so joint owner, on May 1st, 1879, Wm. H. Colehour conveyed the land to the plaintiff Charles W. Colehour, to be held by him on the trusts expressed in the instrument *dated August 16, 1873;* the trust in favor of Roby being for the sole consideration of his serving as Colehour's attorney.

Third: That June 4, 1878, McCoy recovered a judg-

ment against Charles W. Colehour for $3,700 and costs, on which his interest in the land was sold to George F. Harding (a stranger), May 23d, 1885, for $500, and sheriff's deed duly issued to him; and in 1888 Harding conveyed the same to Roby.

That in September, 1878, Horton recovered judgment against Wm. H. and Charles W. Colehour for $4,113.58 and costs; that this debt was for money paid on the $90,000 incumbrance given the Clarks. That execution was levied on certain of the lands, which were by the sheriff sold to Landis (a stranger); and sheriff's deed duly issued to him Nov. 1, 1883. That Roby offered to and did purchase that land of Landis, agreeing to hold the title in trust for the Colehours, under the instrument of Aug. 16, 1873.

That Sept. 24, 1878, a judgment was recovered by Crane Bros. Mfg. Co. *v.* Wm. H. and Charles W. Colehour for $3,591; that 534 lots (named) were sold to Roby on that judgment Sept. 14, 1886; and sheriff's deed issued to Roby. That prior to the sale Roby purchased the judgment for $750, of which C. W. Colehour paid $250; and Roby agreed if sale should be made of lands thereunder he would hold them as trustee under said declaration of trust of Aug. 16, 1873.

Fourth: That in the years from 1874 to 1877, lots had been conveyed to Lender, taking back his notes and trust deeds securing the same on the lots sold him; "said "Lender agreeing to hold the title under the same trust "said William H. Colehour held by; and to redeem the "same when the notes he gave were paid or surrendered "to him"; and that Roby by representing that he had got the Colehours' interest, got Lender to convey those lots to him Nov. 26, 1886.

Fifth: That in January, 1887, Roby procured Wm. H. Colehour to quitclaim and release all the lands to him by frauds, *namely:* writing the deed so Wm. H. could not read it; and falsely reading it to him; and representing to William that he (Roby), did not hold his judgment sales and titles in trust for Charles.

Note: The frauds alleged in the bill of Wm. H. Colehour were: that he and his wife did not sign the deed recorded and produced by Roby but they signed one Roby

pretended to read, and the one recorded was forged by Roby by filling up a blank deed over their signatures, which they had made long before; Roby also representing that he held his judgments and judgment titles as his own.

Answer.

Meeting the bill Roby's answer admits a joint or common interest in the land adventure in 1873; but denies that it was acquired in consideration of betraying clients, or becoming the attorney of the Colehours. It totally denies the instrument of *Aug. 16, 1873*, and the agreement therein stated. It sets out an assignment of a quarter interest to him (Roby) in consideration of $4,400 paid by him, and a declaration of trust, which does not suggest that he is to do anything as an attorney.

This answer admits that the judgments were entered as stated, that the sales and deeds were made on the first two to strangers (Landis and Harding), and that he (Roby) bought the lands of them; that the Crane judgment was bought by him (Roby), and the lands named were sold on that judgment and bought by him. As new matter it alleges that this judgment was for an individual debt of Charles Colehour. The answer denies that Charles furnished any of the purchase money on Roby's purchase of the judgment.

The statute of frauds is set up as to every claim.

In addition, and *as new matter* this answer set up:

(1.) That Sept. 22, 1876, Charles W. Colehour conveyed his interest in the land to Wm. H. Colehour.

[The deed read in evidence was very short as follows:

"In consideration of the endorsements of my notes for twenty thousand dollars, and one dollar to me in hand paid, the performance of both of which are hereby acknowledged as done by Wm. H. Colehour, I hereby quitclaim to Wm. H. Colehour all my right, title and interest in and to the S. ½ and N. E. ¼ of Sec. 8 and Sec. 17, both in Township 37, R. 15, Cook Co., Ill., September 22, 1876.

CHARLES W. COLEHOUR. (SEAL)"]

(2.) That June 4, 1878, McCoy recovered judgment v. Wm. H. Colehour for $3,700, and costs on which lots mentioned were sold to George F. Harding, and sheriff's deed issued to him therefor Oct. 13, 1886; part of which he afterwards conveyed to Roby.

(3.) That Aug. 30, 1878, Charles W. Colehour filed his petition in bankruptcy (scheduling $819,675,45 of debts), was adjudged, assignee appointed and all his assets conveyed to him.

(4.) That Aug. 30, 1878, Roby filed his petition in bankruptcy (scheduling his interests under the declaration of trust); was adjudged Sept. 7, 1878, assignee appointed, and all property assigned to him.

That Roby was discharged Nov. 30, 1880.

That Feb. 4, 1882, the assignee in bankruptcy sold the assets, including the interests and claims under said declarations of trust to deft. (Roby).

(5.) That deft. (Roby) purchased of Lender in 1886 the lots which he claimed to own, and of which he had title, for two thousand dollars, which he paid to him. (The answer denied that there was any trust known to Roby or evidenced in writing.)

(6.) That January 12, 1887, Wm. H. Colehour and Roby agreed that Wm. H. owed Roby for perverted funds (over $80,000), and Roby released him from that debt, and caused to be conveyed to him a lot for which he (Roby) paid $400, also three other lots on which Wm. H. was living, and contracted to convey a fourth lot when he should receive a deed thereof from the sheriff on the Crane judgment and other considerations;—and, in consideration thereof, Wm. H. Colehour made to Roby two deeds (1), the deed mentioned in the bill, and (2) another deed assigning all notes and equitable interests.

The decree finds:

(1.) That the parties had a joint or common interest in the land adventure in 1873.

(2.) That Roby paid $4,400 for his interest; that the evidence of the arrangement between the parties was the declaration produced by Roby which recites the payment

of the money for his interest by him; and that the declaration of trust purporting to have been made by Wm. H. Colehour *Aug. 16, 1873*, was not the one agreed on between Roby and the two Colehours; that the minds of the parties did not agree on that instrument, but that the other instrument was agreed on by all the parties as containing the true declaration of the interests of the parties, and must be so treated and held; that the charge that Roby offered to betray his client Clark in 1873 is not sustained by the evidence.

(3.) The decree finds haec verba, the alleged deed dated May 29, 1873, contracting to pay $5,000 a year for Charles W. Colehour's services, and making such payment an irrevocable charge on the land.

(4.) That Sept. 22, 1876, Charles W. Colehour quitclaimed to Wm. H. Colehour all his interest in said premises.

(5.) That Aug. 31, 1878, Roby filed his petition in bankruptcy, that he scheduled his interest under the declaration of trust to Hansbrough, also under the declaration to himself which the decree establishes; that assignee was duly appointed, etc.; that he (Roby) was duly discharged Nov. 23, 1880; and that January 21, 1882, he purchased from the assignee in bankruptcy all interest derived under said declarations of trust.

NOTE: Transcripts of the records of the District Court of the U. S., duly certified, in evidence, show that Aug. 30, 1878, Charles W. Colehour filed his petition in bankruptcy, was adjudged, assignee appointed, etc., and that said Colehour was afterwards discharged.

(6.) The decree further finds that May 1, 1879, (after the estate of both Roby and Charles W. Colehour were in the bankrupt court) William H. Colehour executed a deed to Charles W. Colehour of the trust lands—consideration nominal, without warranty, "sub-"ject to declaration of trust made *Aug. 16, 1873*, the "lands being conveyed subject to the terms of said "trust" (which is the one against which the decree finds.) (Deed copied *haec verba.*) And that Roby had notice of that deed on January 12, 1887.

(7.) The judgment of McCoy *v.* Wm. H. Colehour and sheriff's deed thereunder, to Harding in 1885, and

conveyance by Harding to Roby in 1888, are proved by the Record.

(8.) The decree finds the judgment in favor of Horton *vs.* Wm. H. and C. W. Colehour Oct., 3, 1878, for $4,113.58 and costs, and the sale of lands thereunder, and deed thereof to Landis Nov. 1, 1883; and sale and conveyance of the same land by Landis to Roby March 26, 1884, (for $600).

(9.) The decree finds the judgment of McCoy *vs.* C. W. Colehour for $3,700, entered June 4, 1878 (before his bankruptcy); the sale of all his interest in the land in question thereunder by the sheriff, May 23, 1885, to George F. Harding; and conveyance by Harding to Roby in 1888.

(10.) The decree finds the judgment of Crane Bros. Mfg. Co. *v.* Wm. H. and C. W. Colehour, Sept. 24, 1879, for $3,591, and sale of lands thereon to Roby Sept. 14, 1886, for $5,129.52; and subsequent sheriff's deed to Roby Nov. 1, 1887.

Note 1st. The evidence is that this was a personal debt of Charles W. and Wm. H. Colehour, contracted for their individual purpose, in no manner connected with the trust. (C. W. Colehour's tes.)

Note 2d. The evidence is wholly unquestioned that Roby prosecuted this claim as attorney for Crane Bros. Mfg. Co. against the Colehours, from April, 1879, till he bought it April 10, 1885, and until he issued the execution on it and sold the land.

Note 3. The evidence is that Charles W. Colehour did not pay any part of the purchase price of this judgment when Roby bought it from the Cranes as C. W. Colehour alleged in his bill, but that he, Colehour, bought Crane's judgment against Roby and compelled Roby to pay the whole sum which Roby had agreed to pay the Cranes.

NOTE B. The decree does not find any written agreement by Roby to purchase any of the lands for the Colehours, or any writing manifesting any trust. The record shows there was none; but that the decree was based only on *constructive trust*, created by operation of law, without writing, and notwithstanding the statute of frauds which was fully set up in the answer.

(11.) The decree finds the two deeds of January 6 or 12, 1887, from Wm. H. Colehour to Roby; and finds the consideration insufficient, because it holds that Roby had before that time held his judgment titles for C. W. and Wm. H. Colehour by constructive trust.

(12.) The decree finds that the alleged settlement of 1879 is not sustained by the evidence.

(13.) The decree finds specifically "*that said Roby was not guilty of any actual, or intentional fraud.*"

(14.) It also finds specifically *that the gross charges of fraud* (made in the bill of Charles W. and cross-bill of Wm. H. Colehour, and which formed the substance of those bills) *are not proven by the evidence in the case.*

Note 1. These last two specific findings eliminate a very large part of the bills. If an attorney undertakes to buy for a client, and buys in his place and afterwards claims the property as his own that is *actual* fraud; if a man obtains an advantage by any subterfuge or misleading another that is *actual* fraud. The decree finds clearly that Roby was not guilty of *any* actual fraud; and in this it is overwhelmingly sustained by the evidence.

Note 2. Looking into the evidence, it appears that Roby never received any retainer or compensation as attorney for either Colehour. That any relation of attorney grew out of the joint interest in the adventure. As stated in the opinion of the Circuit Judge; he held, that "Roby, not from any express retainer, but from the relation growing out of the business of the trust or joint "adventure, had for years occupied the position as attorney toward both the Colehours." It also appears, by very full evidence, wholly uncontradicted, but admitted to be true, that Roby did act as attorney against the two Colehours, prosecuting suits against them through 1879, 1880 and 1881 with great severity.

The ground stated in the cross-bill of William H. Colehour, after averring express trusts is: "That independent "of any such understanding or agreement the said Edward Roby *was disabled* from acquiring an adverse title

" to your orator or to the said Charles W. Colehour by " reason of the joint arrangement made between them as " hereinabove stated, *in the year 1873;* and also for the " further reason that the relation of attorney and client " existed between them."

The Bill of Charles Colehour asserts, and *the decree includes*, the power of attorney or deed of William H. Colehour to Charles Colehour, dated May 9, 1873, contracting to pay Charles $5.000 a year and charging it as a lien on the land. But the bill avers services under that only from 1872 to 1879, or "from 1873 to 1878, inclu- " sive." The proof by Charles Colehour was, that in the fall of 1878 he went away and was absent from the state for five years, except flying visits.

The decree finds as matter of fact:

" That *the only judgments* on which sales were made of any of the trust property in this case were:

(1) McCoy *v.* Charles W. Colehour.
(2) Horton *v.* Charles W. and William H. Colehour.
(3) Crane Bros. Mfg. Co. *v.* Charles W. and Wm. H. Colehour.

" And that all the lands and lots sold under any and all " such judgments passed to said Edward Roby; and the " titles were in said Roby at the filing of the bill in this " case."

As matter of law the decree finds

" That the deed of May 1st, 1879, of Wm. H. to " Charles W. Colehour * in and by which all of the prop- " erty therein described was conveyed to Charles W. Cole- " hour to hold under declaration of trust, and which deed " is set out hereinabove in full, is binding and in full force " between the parties hereto; and makes Charles W. " Colehour the trustee of the trust property involved in " this suit in the place and stead of Wm. H. Colehour. " That Charles W. Colehour is the owner of and entitled " to the one-half, William H. Colehour to the one-quarter, " and Edward Roby to the one-quarter interest, accord- " ing to the terms as set forth in said declaration of trust, " of all said trust estate."

The law arising out of this record is:

1.

As to the power of attorney and contract to pay Charles W. Colehour $5,000 a year, and mortgaging the land for its payment, found in the decree, on which the bill alleges that Charles Colehour rendered the services from 1872 to 1878, inclusive, and never received more than $1,500 in any year, and some years not that; it is clear that so far as that in the remotest respect vested any property in Charles W. Colehour, and so far as any money was due to him on that, it was voluntarily assigned by Charles W. Colehour, August 30, 1878, and became the property of his assignee in bankruptcy, and is still the property of that assignee or the person to whom that assignee sold it.

Bankrupt Act, U. S. R. S., Sec. 5044.
Bump on Bankruptcy, 486–9, 490–500.

The language of the statute is sufficiently comprehensive to embrace the most minute and temporary interest in property.

French *v.* Carr, 2 Gilm., 664.

Where the services have been rendered by the bankrupt, the right to the compensation passes to the assignee even though it depends on a contingency.

Burton *v.* Lockert, 9 Ark., 411.

The interests and rights of the bankrupt under contracts are transferred to the assignee. Whatever the rights are, the assignee can claim and enforce them.

Foster *v.* Hackley, 2 Bankruptcy Register, 406.

As the most minute and temporary property interest passed to the assignee in bankruptcy (Aug. 30, 1878) there could be nothing claimed by Charles Colehour under that contract unless it left after bankruptcy a mere contract for services. And no contract to be a servant, or for pay as a servant, could raise a constructive trust under the bill. (The proof, however, shows that he absented himself for five years; and his averments claim nothing after 1878.)

The petition in bankruptcy of Charles Colehour and

proceedings under it were set up in bar, and were proved; and Charles Colehour can claim no property right under that contract of May 29, 1873.

Carr *v.* Gale, 3 W. & M., 38.
Johnson *v.* Geisriter, 26 Ark., 44.
Barron *v.* Newberry, 1 Bissel, 149.
Bump on Bankruptcy, 488.

If that contract, or the amount due on it, gives any right against Roby, it is either in the assignee in bankruptcy of Charles W. Colehour, or in the person to whom that assignee has sold it.

2.

The decree next charges with a constructive trust in Roby's hands the lands sold under the judgment of McCoy *v.* Charles W. Colehour.

The decree finds the judgment giving the particulars. It was against Charles W. Colehour alone, was for $3,700 and costs, and was entered June 4. 1878.

We have seen that Charles W. Colehour was duly discharged from his debts by the Bankrupt Court, May 5, 1883.

Hence the only title or interest sold was that held by Charles W. Colehour June 4, 1878, and at the date of his petition in bankruptcy, viz: Aug. 30, 1878.

The judgment was against Charles W. Colehour alone.

Nothing was sold on it but *his interest alone*, which had passed to his assignee in bankruptcy.

The right of redemption was vested in his assignee in bankruptcy, or in the person to whom the assignee had sold it.

Neither Colehour had any interest in it.

The decree treats this judgment sale as actually carrying a title, and finds that that title is vested in Roby.

But when that judgment sale was made to Harding May 23, 1885, Charles Colehour had had no interest in the property sold for almost seven years. He had voluntarily vested it in his assignee for the benefit of his creditors, and had been discharged from all his debts in consideration thereof.

What Roby bought had never been common property, and he had never been an attorney concerning it.

It had been Charles W. Colehour's individual property interest, which passed from him to his assignee in bankruptcy subject to the judgment. Charles Colehour had been discharged from the debt evidenced by the judgment.

3.

The deed of Wm. H. Colehour to Charles W. Colehour, dated May 1, 1879, is next in order of dates.

That deed is found in the decree *haec verba*.

The decree finds that this deed "is *in full* and binding "*force* between the parties hereto, *and makes Charles* "*W. Colehour the trustee of all the trust property in-* "*volved in this suit in the place and stead of Wm. H.* "*Colehour*."

It does so by these words contained it: "This deed "is made and delivered subject to a declaration of trust "made by me *August 16th 1873*. And the above de- "scribed land is conveyed subject to the terms of *said* "*trust*, the original of which declaration of trust is in the "possession of Charles W. Colehour, grantee hereof."

The same decree (that finds this deed and these words are *in full force*, and that they make Charles W. Colehour trustee of the lands) finds, "that the declaration "of trust dated August 16, 1873, and in Charles W. "Colehour's hands was not the one agreed on between "Roby and the Colehours; that the minds of the parties "did not agree upon said instrument dated August 16, "1873; but that the declaration of trust above copied "was agreed to by all parties, and was *delivered to said* "*Roby* as containing the true declaration of the interest "of the parties, and it must be so treated and held." The decree finds that this one delivered to Roby was executed in the month of October, 1873, and gives a copy of it, which is without the date.

The paper dated the *16th of August, 1873*, mentioned and referred to in the answers of C. W. Colehour in each of the three first above named suits and in his bill in the

fourth is copied in his bill as well as in each answer, and is printed. He introduced it in evidence. It provides that the power of attorney contracting to pay Charles W. Colehour $5,000 a year and securing it on the land, shall remain in force. Charles W. Colehour pleaded that power of attorney with this declaration of August 16, 1873, in his bill as the basis of his rights.

The whole claim of Charles W. Colehour (and of Wm. H. Colehour) in his bill is that he acquired his interest as early as 1873 and held it constantly in common with Roby from 1873 till this date.

That is the entire scope of his bill.

Roby answered and proved that Aug. 30, 1878, Charles W. Colehour took the benefit of the bankrupt act; and August 31, 1878, he (Roby) went into bankruptcy.

That met the whole scope of the bill.

If Colehour would overcome the effect of the bankruptcy proceedings he was bound to amend his bill.

Tarleton *v.* Vietes, 1 Gilm., 470, p. 473-4.
White *v.* Morrison, 11 Ill., 361, p. 366.
Cooper Eq. Pl., 330, 332.
Story Eq. Pl., Sec. 521, 675, 679.

The situation at the date of this deed of May 1, 1879, was:

(1.) If the deed of Sept. 22, 1876, was an actually delivered conveyance and was valid and not a mortgage, it conveyed all Charles W. Colehour's interest in the property to Wm. H. Colehour on that day; and from that date he had no common interest with Roby or Wm. H. Colehour; and Roby was not his (Charles W. Colehour's) attorney concerning the land; because he (Charles W.) had no interest in it. Roby pleaded it for that purpose, and produced it in evidence; as Wm. H. Colehour, the grantee, had delivered it to him (Roby)

Jan. 12, 1887, when Roby bought all Wm. H. Colehour's interest in the land. And if Charles W. Colehour continued to manage the land after Sept. 22, 1876, under his contract, dated May 29, 1873, it was only as a servant and not as a party in interest.

If that deed of Sept. 22, 1876, was a release of all Charles W. Colehour's interest, then, as pleaded and proved, it was a bar to his bill, for his bill alleged that he derived rights in 1873 by virtue of certain deeds and had held them ever since.

The averment of his bill is that Wm. H. Colehour was trustee for him May 1, 1879, under a declaration of trust dated in 1873. *That is the idea carried by that bill and no other.*

No other claim or averment can be made out of that bill. And Roby, or any other person, defendant to such a bill, has a right to know what the claim or averment is.

If William H. Colehour had not been trustee for Charles W. Colehour for three years, from Sept. 22, 1876, to May 1, 1879, the averment of the bill makes no suggestion that Charles Colehour acquired any interest under that deed, and he can claim none under that bill as the basis of any right against Roby.

A proposition to change the estate of the grantee in that deed by oral evidence against the plain words of the instrument (especially *without any averment in the bill*) cannot be entertained against the assignee in bankruptcy of Roby or against a purchaser of the land from such assignee. (*Lessee of Smith* v. *McKann*, 24 How., page 406; Tiffany & Bullard on Trustees, pp. 37–8.)

If Wm. H. Colehour was originally trustee for two persons in one-quarter of the land as to one, and half as to the other, under any instrument, and one released all interest to him, he would continue trustee for the other under the same instrument. If, after three years, he should deed the legal title to a stranger to act as trustee *instead of* himself, that would not operate to revest an estate in one for whom he had not been trustee for three years. The averment of the bill is only that Charles was to be trustee *instead* of William.

Hence, if that deed of 1876 was a complete divestiture of the interest of Charles W. Colehour, he can claim no

right for himself under the deed of May 1, 1879, as averred in his bill.

(2.) The decree, however, finds "that the said Ed-" ward Roby *from the time of the making of the arrange-* " *ment* and contract in the declaration mentioned between " him and the said Charles W. Colehour and William H. " Colehour in October, 1873, acted as attorney, solicitor " and counsel for the said Colehours, with reference to " said property and *joint adventure in which they were en-* " *gaged until after the making* of the said deed and in-" strument of assignment in writing to said Edward Roby, " in January, 1887."

This is on the same basis as the averments of the bill, that the interest begun in 1873, and continued a joint adventure, Roby a joint adventurer with Charles W. Colehour, and his attorney touching that land all the time till 1887.

This is in effect deciding that the deed of Sept. 22, 1876, above copied was a mortgage, or had no effect to divest the interest of Charles W. Colehour.

The declaration of trust, found in the decree to be the true one, contains this clause: "But no assignment of " any interest shall be made without the written consent " of all the parties hereto first obtained." No such written consent was given by Roby. No consent at all is found, and the court may have regarded this deed as void.

If valid, and not a mortgage, it was a bar to Charles W. Colehour's claim *in manner and form as made in his bill.* If void, or a mortgage, Charles Colehour retained his joint interest with Roby till it went into the Bankrupt court.

(3.) But August 30, 1878, Charles W. Colehour filed his petition in Bankruptcy, was adjudicated, assignee appointed, and all Charles Colehour's estate was conveyed to him. The most minute interest Charles Colehour had went to his creditors, and he got discharged from $819,-675.45 of debts, in consideration thereof. (*French* v. *Carr*, 2 Scam., 664, pp. 667, 669.)

August 31, 1878, Roby filed his petition, was adjudicated, and all his interest passed to his assignee.

Both were *civiliter mortuus*, and had no interest in the property whatever after that.

Bump on Bankruptcy, 488.
Tallcott *v.* Dudley, 4 Scam., 427, p. 436–7.
Strong *v.* Clawson, 5 Gilm., 346, p. 349.
Harris *v.* Cornell, 80 Ill., 64, 65.

Under his pleadings in this case *Charles Colehour is estopped to claim* that he did not own the interest held by him as cestui que trust in 1873 down to the date of his bankruptcy.

And the bankrupt proceedings were set up in the answer as new matter, in defense, against his claim *as averred.*

May 1, 1879, William H. Colehour was trustee for the assignee in bankruptcy of Roby as to one-fourth of the land; and for the assignee in bankruptcy of Charles W. Colehour as to one-half, and neither Roby nor Charles W. Colehour had any interest whatever in the property.

The deed of May 1, 1879, was not recorded till July 14, 1888.

There is no averment or pretense that the assignee in bankruptcy of Charles W. Colehour, or the assignee in bankruptcy of Roby had any notice of that deed.

The only finding of notice is that Roby knew of the existence of said deed before the execution and delivery of the deed of Wm. H. Colehour to him, dated January 6, 1887.

The attempt to substitute a trustee without the knowledge or consent of the cestui que trust was void.

Wormley *v.* Wormley, 8 Wheat., 438–9.
Perry on Trusts, Sec. 287 et seq., 401–2.
Lewin on Trusts, 257.

But no beneficial interest passed to Charles W. Colehour. If Wm. Colehour was trustee for him (Charles) when he made that deed, *as his bill avers*, Charles Colehour has no interest to-day. It is vested in the assignee in bankruptcy, or in the person to whom that assignee may have sold it.

Nothing can be made out of the averments of Charles Colehour's bill, but that Wm. H. Colehour was trustee for him before and up to the time he made that deed. To that bill the averment and proof of Charles Colehour's

petition and adjudication in bankruptcy is a complete defense, for it shows that the assignee in bankruptcy owns the half Charles is suing for, and Charles Colehour has no interest whatever in it.

Roby had no interest whatever in the property when that deed was made, and no knowledge of its existence till January 12, 1887.

That deed could form no basis for making a constructive trust against Roby in favor of either Colehour.

4.

The decree next charges with a constructive trust in Roby's hands the lands sold under the judgment of Horton *v.* Charles W. and William H. Colehour.

The bill alleges that this judgment was rendered in September, 1878, for $4,113.58 and costs. And that the debt on which said judgment was recovered was contracted to raise money to pay, and which was paid on said Clark indebtedness, which was well known to said Roby.

The decree finds that this judgment was rendered at the September term 1878, that the land was sold to Roland R. Landis thereon July 31, 1882, and Sheriff's deed issued to him November 1, 1883.

The actual date of that Judgment was Oct. 3, 1878.

The decree does not find whether the money for which the debt was incurred was paid on the incumbrance on the trust land as averred in Charles Colehour's bill, or was borrowed to supply the place of money the Colehours had embezzled as charged in Roby's answer.

If there had been any obligation to pay part of that judgment, Roby was discharged from it, and *in consideration of that discharge Roby gave up all his assets to his assignee.* If there was any obligation of Roby to pay any part of that, Wm. H. Colehour could have proved the claim in bankruptcy against Roby's estate and have shared in the proceeds of the assets. His right became complete when the land was sold to Landis on that judgment in satisfaction thereof.

Bump on Bankruptcy, 590.

If there was no obligation on Roby's part to pay any part of that debt; but Wm. H. Colehour had the property

in his hands to pay it with, and had a right to apply the trust property to pay that debt, he did so apply it, and satisfied the debt with it. (*Rorer on Judicial Sales*, Sections 46–58.)

There is no averment anywhere that the land was sold to Landis in satisfaction of the debt for less than it was worth.

There is nothing in the sale to raise a constructive trust against Roby when he bought the land from Landis, any more than if Wm. H. Colehour had conveyed to Landis for the same consideration by Warranty Deed.

It is true Roby purchased all his assets, including the interests under the declarations of trust from the assignee in Bankruptcy, January 21, 1882. He had stated that in his answer. But that alone did not form a basis for a constructive trust, in the absence of all actual fraud.

A bankrupt may buy property from his assignee with his earnings or with the proceeds of exempt property; and he stands in the same position as a stranger in making the purchase. The object of the bankrupt law being to enable him to take a fresh start. (*Traer* v. *Clews*, 115 U. S., 528.) He is dead as to his old property and assets; but alive to acquire *new property*. Carr *v.* Gale, 3 W. & M., 38; Johnson *v.* Geisriter, 26 Ark., 44; Barron *v.* Newberry, 1 Biss., 149.

The judgment was entered Oct. 3, 1878. It was satisfied by sale and deed of the land, consummated November 1, 1883, and R. R. Landis got a good title to it, free from any equities.

It was gone forever. Neither the assignee in bankruptcy of Charles W. Colehour nor William H. Colehour nor Edward Roby had any interest in it.

It was not common property nor in any way connected with a joint adventure.

Wm. H. Colehour had been entirely satisfied with the sale; he never notified Roby of the sale, nor asked him to redeem.

Not being common property or in any manner vested in Colehour, and neither Colehour having the slightest interest in it, or claim upon it, it was not a subject concerning which it was possible for Roby to be attorney for either Colehour.

Charles W. Colehour's deed of May 1, 1879, was secret, Roby knew nothing of its existence till January 12, 1887. Charles W. Colehour's deed to William of Sept. 22, 1876, was not recorded; was void under the terms of the declaration of trust at the option of Roby or his assignee, and appeared to be a mortgage. Charles W. Colehour's bill treats it as void; therefore his half interest went to his assignee in bankruptcy. Charles had nothing in common with Roby's assignee in bankruptcy, and nothing in common with Roby. There was nothing of that old venture on which Roby could be attorney for Charles Colehour, after all Charles' interest in it passed to his assignee.

William H. Colehour's claim is that Roby was disabled to make that purchase from Landis by reason of the joint arrangement made between them as hereinabove stated in the year 1873, and also for the further reason that the relation of attorney and client existed between them.

(1.) The joint arrangement did not apply to any land disposed of by Wm. H. Colehour, after he had parted with all title to it and all claim upon it.

(2.) The relation of attorney and client did not exist as to any land to which Wm. H. Colehour had no title, and for which he had no claim.

Therefore Roby was not disabled to purchase from Landis.

The question whether any trust arose in favor of any one when Roby purchased from Landis, a title which Landis had held for nearly five months free from any trust, is settled.

Kingsbury *v.* Buckner, 70 Ill., p. 520.
Welch *v.* McGrath, 59 Iowa, pp. 528–530.
Silverthorn *v.* McKinster, 12 Pa., p. 71.
Clark *v.* Holland, 72 Iowa, 34.

Roby's bankruptcy and assignment of property was a severance of all joint interests and adventure and obligation of 1873.

If either party desired to aver a new contract, or a new promise in consideration of any old relation, it was necessary to plead it when the answer set up the bankruptcy of both C. W. Colehour and Roby, which put an end to

all that was of substance in the old relations averred in the bills.

Tarleton *v.* Vietes, 1 Gilm., 470, p. 473, 474.
White *v.* Morrison, 11 Ill., 361, p. 366.
Cooper Eq. Pl., 330, 332.
Story Eq. Pl., Sec. 521, 675, 679.

At law, new matter to avoid the effect of the defense must be replied, in equity it must be pleaded *or it is waived.*

In relation to this Horton judgment and purchase from Landis by Roby, it should be remembered that Roby was attorney against both Colehours after going into bankruptcy in many severely litigated cases, from April, 1879, till 1883, and later.

5.

The decree next charges with a constructive trust in Roby's hands the lands sold under the judgment of Crane Brothers Manufacturing Co. *v.* Charles W. Colehour and William H. Colehour.

That judgment was entered Sept. 24, 1879.

The bankruptcy law had taken away all common interest between Roby and either Colehour, August 30 and 31, 1878.

Roby was attorney for the plaintiff against the Colehours, in this matter, from April 25, 1879, till the sheriff's deed issued.

The judgment did not concern any land that had been common property, for the judgment was on a note given for an elevator put into Charles Colehour's building on Washington street, a personal debt of the Colehours that did not concern anything in which Roby was interested.

The only equity, claimed in Charles Colehour's bill, was that Roby bought that judgment for $750, of which he, Charles paid $250. The proof was that Charles did not pay it. Judgment was got against Roby for $250 of the price he paid for an assignment. And Charles Colehour bought that judgment which was against Roby.

That was not a payment of it. *Lloyd* v. *Karns*, 45 Ill., 67. Afterwards Colehour compelled Roby to pay that $250 with the interest.

Roby was attorney for the Cranes against the Colehours at all times from April 25, 1879, in this very case, and to collect this very claim.

The claim did not touch anything in which there was a common interest, but was for the individual debt of the Colehours.

There was no common interest and no relation of attorney and client touching it, and Roby bought the judgment April 10, 1885, paid $500 cash, and Colehour not only did not pay anything, but bought the debt of Roby to the Cranes for the balance of the purchase price, and compelled Roby to pay that balance.

Touching this judgment Colehour could claim no constructive trust in it in Roby's hands.

Roby, as purchaser, succeeded to the plaintiff's rights. The plaintiff had no notice of any trust in favor of any one. No declaration of trust was recorded. The title appeared clear in Wm. H. Colehour. A purchaser with notice from one who had no notice, steps into the shoes of his vendor and takes his title free from the equity or claim. A judgment creditor obtains a lien superior to all undisclosed conveyances. Notice of an unrecorded deed, or any right, at the time of the levy of execution and sale will avail nothing as against the force of the lien. (*Columbus Buggy Co.* v. *Graves*, 108 Ill., 462.) Purchaser with notice will get a good title from a purchaser without notice, and will stand in his shoes.

Peck *v.* Arehart, 95 Ill., 117.
Mills *v.* Smith, 8 Wallace, 27.
Leading Cases in Equity by Hare & Wallace, pp. 59 and 99, and cases there cited.

Under the definitions found in *Perry on Trusts*, Sec. 126, the trusts wherewith it is sought to charge Roby's judgment titles are resulting trusts. The same author gives the following, supported by a host of authorities:

"§ 133. The trust must result, if at all, at the instant "the deed is taken, and the legal title vests in the grantee. "No oral agreements, and no payments before or after

" the title is taken, will create a resulting trust, unless the " transaction is such *at the moment the title passes* that a " trust will result from the transaction itself."

In this case it is claimed *that at the time Roby made his several purchases of judgment titles and of the judgment of Crane, he was disabled to purchase for himself;* and that was the decision of the court, and the foundation of its whole opinion.

Tested by the principles of the opinion in this case as to each purchase Roby of right could hold it as his own.

Kingsbury v. Buckner, 70 Ill., p. 520.
Welch v. McGrath, 59 Iowa, pp. 528, 530.
Silverthorn v. McKnister, 12 Pa., p. 71.
Clark v. Holland, 72 Iowa, 34.

The Illinois court has drawn extremely hard lines, for it appears that Wm. C. Goudy was the attorney of the Colehours during all the time from 1870, touching the trust lands; that Roby's attorneyship grew out of his own interests; that in the case of Boone v. Clark (the foreclosure case of Clark v. Colehour on the $90,000), Roby's attorneyship was for the Boones and others adverse to Colehour; that Roby prosecuted both Colehours as attorney for others from April 25, 1879, in litigated and sharply contested and sharply executed cases; that he quarreled with the Colehours and claimed they robbed him. It appears by the opinion of the Circuit Judge that Roby never was paid or retained as an attorney; that the consultations, on which he predicates the relation, were when Roby was in the case acting for Boone and others adversely to Colehour, and that the relation of attorney was the most *attenuated* possible, not known to Roby, giving him no control, and of no remuneration to him. Still, going back to the purchases by Roby of the Judgment titles and the judgment of Crane on which the claim of resulting trusts is based, it appears that the relation of partner in the property purchased or of attorney concerning it did not exist in either case.

We have given the scope of the bill, and to that bill the Bankrupt proceedings, &c., above mentioned were a complete defense.

As to each of the separate judgment titles bought by

petitioner (Roby), and as to the judgment of Crane *v.* Colehour, the title should be restored to him as was done in Kingsbury *v.* Buckner, 70 Ill., 520.

As to the Crane Judgment, there is no case where a partner (even) has been compelled by his copartner to pay that copartner's private debt, to save partnership property. The bill of Colehour failed as to that judgment. Roby bought it with his own money, and was under no disability concerning it.

Certificate of Federal Question.

State of Illinois. In the Supreme Court. Of the Northern Grand Division.

Edward Roby, plaintiff in error, *vs.* Charles W. Colehour, deft. in error.

Edward Roby, plaintiff in error, *vs.* Charles W. Colehour and James E. Clark, defts. in error.

Edward Roby, plaintiff in error, *vs.* Charles W. Colehour and Jared Myers Clark, defts. in error.

Edward Roby, plaintiff in error, *vs.* Charles W. Colehour and William H. Colehour, defts. in error.

Error to the Circuit Court of Cook County.

Be it remembered that the above entitled causes having been heard together and decided in one decree in the Circuit Court of Cook County, and having been considered upon one record in this Court, and taken under advisement at the September Term, A. D. 1890, and afterwards having been decided in vacation and judgment entered therein in vacation, to wit: November 26th, A. D. 1890, and petition for rehearing having been heard therein at the March Term, A. D. 1891, and denied (the opinion theretofore rendered having been modified).

Now comes the said plaintiff in error by General John M. Palmer, his counsel, and suggests *to the Judges of this Court that he desires to remove the said consolidated causes into the Supreme Court of the United States, and prays the Judges of this Court to certify the federal questions* in conformity with the practice indicated by the decisions of the said Supreme court of the United States, *and we be-*

ing willing that the questions and decisions subject to review by said Supreme Court may be made manifestly to appear of record to the end that the rights of the said plaintiff in error to a review of the errors of this Court upon matters subject to the jurisdiction of said Supreme Court of the United States may be fully saved, *do certify and order it to be entered of record in this Court* to the end that it may be so certified to the said Supreme Court of the United States.

That the said Edward Roby pleaded his petition in bankruptcy and adjudication, and assignment to his assignee in bankruptcy and his full discharge from all his debts existing at the time of filing his petition in the District Court of the United States in and for the northern district of Illinois, and insisted upon said proceedings and discharge as by its legal effect and operation discharging and releasing him from all obligations, liabilities, duties and trusts growing out of his interests in the lands or the profits arising from the sale thereof, and from his relations as partner or jointly interested therein, but this Court in considering the law and the facts of the cases decided against the rights and claims by the said Roby made under such proceedings, and discharge so claimed, pleaded and insisted on by him, but on the contrary held and decided that such was not the legal effect and operation of such proceedings and discharge, and that such proceedings and discharge did not operate in law or equity to discharge the said Roby from all his obligations, liabilities, duties and trusts with respect to and growing out of his interest in said lands and of his relations to said parties.

That said Roby further pleaded that he purchased all the interest in said lands and claims upon the proceeds thereof after his discharge aforesaid, from Bradford Hancock, Esq., Assignee in Bankruptcy of him, said Roby, and claimed and insisted that under and by virtue of the provisions of the laws of the United States, he as such purchaser took such interest as a stranger free and clear from any duties or obligations or connections existing between said Roby prior to the date of his petition in bankruptcy, and said Wm. H. and Charles W. Colehour, or either of them; and that the deed of May 1, A. D.

1879, given by William H. Colehour to Charles W. Colehour and set forth in *haec verba* in the decree of the Circuit court was void as to said Braford Hancock, assignee in bankruptcy of said Roby, and as to him, said Roby as purchaser from said assignee, and that Charles W. Colehour took nothing by such deed, but this court decided against all the said claims so made by the said Roby, and also decided that such deed was and is valid against said assignee in bankruptcy and against said Roby as purchaser from such assignee.

And the said Edward Roby also pleaded the petition in bankruptcy, and adjudication of the said District Court of the United States for said Northern District of Illinois, that said Charles W. Colehour was brankrupt, and assignment to his assignee duly appointed by said court, and proved the same by exemplification of the records and proceedings of said District Court and by other evidence, and the discharge of said Charles W. Colehour from all his debts existing at the date of his said petition was also proved, and said Roby insisted that by the said proceedings and records it was proved that he, said Charles W. Colehour, was divested of all his demands on the lands in his bill mentioned by reason of the power of attorney and contract by him pleaded and in the decree found bearing date May 29, 1873, and also of all other interests in and claims upon the lands in said bill mentioned, or the profits thereof, and of all interests in common with the said William H. Colehour and Edward Roby and either of them, and that he, said Roby, was by operation thereof exempted from all claims of the said Charles W. Colehour and from his suit on account of said land, and that the proper and necessary effect of such records and proceedings as proof was that said Roby was not chargeable to the said Charles W. Colehour in said suit by reason of community of interests or any other cause, but this court, considering the law and facts of the cases decided against the claims of the said Roby so pleaded, claimed and insisted on, and decided that such was not the legal operation and effect of such proceedings; and that said Charles W. Colehour had a right to sue upon said instrument dated May 29, 1873; that said deed dated May 1, A. D. 1879, was and is valid as against said

assignee in bankruptcy and against said Roby as purchaser from said assignee, and gives said Charles W. Colehour the right to defend the first three above entitled cases against said Roby and to prosecute the fourth as against said Roby, and to claim and enforce all rights of partner, trustee and co-tenant against said assignee in bankruptcy of said Roby and against said Roby as purchaser from such assignee.

JOHN SCHOLFIELD,
Chief Justice, Supreme Court of Illinois.

ASSIGNMENT OF ERRORS.

In the Supreme Court of the United States.
October Term, A. D. 1891.

Edward Roby, Plaintiff in Error, vs. *Charles W. Colehour*, and * * * Defendant in Error.

Error to the Supreme Court of the State of Illinois.

To the Honorable the Supreme Court of the United States:

Edward Roby, plaintiff in error, by John M. Palmer, his counsel, brings this his suit in error; for that whereas lately in the Supreme Court of the State of Illinois, to wit: on the 26th day of November, A. D. 1890, a final judgment or decree was rendered in a certain suit wherein said Edward Roby was plaintiff in error and Charles W. Colehour * * were defendants in error. Said Court being the highest Court of said state in which a decision of said suit could be had. In which suit was drawn in question the validity of a statute of, or an authority exercised under the United States and the decision was against their validity; and title, right, privilege and immunity was claimed under the constitution and statute of, and commission held and authority exercised under the United States, and the decision was against the title, right, privilege and immunity specially set up and claimed by the said Edward Roby under such constitution, statute, commission and authority. As by the record and proceedings in said suit remaining in said Supreme Court of the State of Illinois at Ottawa in the Northern Grand

Division of said state will more fully and at large appear. And thereupon said Roby, as plaintiff in error by his said counsel complaining to this Court, says: that in the record and proceedings aforesaid, and in the judgment and decree aforesaid, there is manifest error in this respect (that is to say):

1. That it appears by the record aforesaid, that the said judgment and decree given as aforesaid was given for the said Charles W. Colehour and * * and against the said Roby, whereas by the law of this land judgment and decree ought to have been given in said suit for the said Roby against the said Charles W. Colehour and * * and therefore it is manifestly erroneous in this respect.

2. The said Supreme Court of the State of Illinois erred in denying to the proceedings, orders and decrees in the District Court of the United States in and for the Northern District of Illinois in the matter of the petition in bankruptcy of said Roby, and adjudication, and assignment to his assignee in bankruptcy, and discharge from his debts the effect upon the matter in issue in said suit claimed therefor by said Roby, and which ought by law to have been allowed to such proceedings, orders, decrees and discharge.

3. The said Supreme court of the State of Illinois erred in denying to the purchase by said Roby from said assignee in bankruptcy, and the deed from said assignee in bankruptcy to said Roby the effect upon the matter in issue in said suit claimed by said Roby and which is due under and by the law of the United States.

4. The said Supreme court of the State of Illinois erred in deciding against the claims of said Roby, that the deed of May 1st, A. D. 1879, given by William H. Colehour to Charles W. Colehour and set forth in haec verba in the decree of the Circuit Court in said record, was void as to said assignee in bankruptcy and as to said Roby as purchaser from said assignee, and that said Charles W. Colehour took nothing by such deed and in deciding that such deed was and is valid against said assignee in bankruptcy, and against said Roby as purchaser from such assignee.

5. The said Supreme court of the State of Illinois

erred in denying to the proceedings, orders and decrees in the District Court of the United States in and for the Northern District of Illinois in the matter of the petition in bankruptcy of said *Charles W. Colchour*, and adjudication and assignment to his assignee in bankruptcy and discharge from his debts the effect upon the matter in issue in said suit claimed therefor by said Roby and which by law ought to have been allowed to them.

6. The said Supreme Court of the State of Illinois erred in deciding that said Charles W. Colehour had a right to sue upon the instrument dated May 29, A. D. 1873, and that said deed dated May 1, 1879 was and is valid as against said assignee in bankruptcy of said Roby and against said Roby as purchaser from said assignee, and gives said Charles W. Colehour the right to defend the cases in said record mentioned against said Roby, and to prosecute as in said record stated against said Roby, and to claim and enforce all rights of partner, trustee and cotenant against said assignee in bankruptcy of said Roby and against said Roby as purchaser from such assignee.

7. The said Supreme Court of the State of Illinois erred in its judgment that neither in the record and proceedings of the Circuit Court of Cook County in said cause, nor in the rendition of the decree therein, is there anything erroneous, vicious or defective, and that that record is no error, and in affirming the judgment and decree of the Circuit Court of Cook County in said cause and adjudging the same to stand in full force and effect notwithstanding the matters and things therein assigned for error, whereas the said Supreme Court of Illinois ought to have adjudged the contrary and reversed the said decree and judgment of said Circuit Court.

WHEREFORE and for divers other manifest errors appearing upon the face of said decree and judgment of said Supreme Court of the State of Illinois, the plaintiff in Error prays that the same may be reversed by this Court; and that this Court will make such order and decree in the case as may be meet.

JOHN M. PALMER,
Counsel for Plaintiff in Error.

Division of said state will more fully and at large appear. And thereupon said Roby, as plaintiff in error by his said counsel complaining to this Court, says: that in the record and proceedings aforesaid, and in the judgment and decree aforesaid, there is manifest error in this respect (that is to say):

1. That it appears by the record aforesaid, that the said judgment and decree given as aforesaid was given for the said Charles W. Colehour and * * and against the said Roby, whereas by the law of this land judgment and decree ought to have been given in said suit for the said Roby against the said Charles W. Colehour and * * and therefore it is manifestly erroneous in this respect.

2. The said Supreme Court of the State of Illinois erred in denying to the proceedings, orders and decrees in the District Court of the United States in and for the Northern District of Illinois in the matter of the petition in bankruptcy of said Roby, and adjudication, and assignment to his assignee in bankruptcy, and discharge from his debts the effect upon the matter in issue in said suit claimed therefor by said Roby, and which ought by law to have been allowed to such proceedings, orders, decrees and discharge.

3. The said Supreme court of the State of Illinois erred in denying to the purchase by said Roby from said assignee in bankruptcy, and the deed from said assignee in bankruptcy to said Roby the effect upon the matter in issue in said suit claimed by said Roby and which is due under and by the law of the United States.

4. The said Supreme court of the State of Illinois erred in deciding against the claims of said Roby, that the deed of May 1st, A. D. 1879, given by William H. Colehour to Charles W. Colehour and set forth in haec verba in the decree of the Circuit Court in said record, was void as to said assignee in bankruptcy and as to said Roby as purchaser from said assignee, and that said Charles W. Colehour took nothing by such deed and in deciding that such deed was and is valid against said assignee in bankruptcy, and against said Roby as purchaser from such assignee.

5. The said Supreme court of the State of Illinois

erred in denying to the proceedings, orders and decrees in the District Court of the United States in and for the Northern District of Illinois in the matter of the petition in bankruptcy of said *Charles W. Colchour*, and adjudication and assignment to his assignee in bankruptcy and discharge from his debts the effect upon the matter in issue in said suit claimed therefor by said Roby and which by law ought to have been allowed to them.

6. The said Supreme Court of the State of Illinois erred in deciding that said Charles W. Colehour had a right to sue upon the instrument dated May 29, A. D. 1873, and that said deed dated May 1, 1879 was and is valid as against said assignee in bankruptcy of said Roby and against said Roby as purchaser from said assignee, and gives said Charles W. Colehour the right to defend the cases in said record mentioned against said Roby, and to prosecute as in said record stated against said Roby, and to claim and enforce all rights of partner, trustee and cotenant against said assignee in bankruptcy of said Roby and against said Roby as purchaser from such assignee.

7. The said Supreme Court of the State of Illinois erred in its judgment that neither in the record and proceedings of the Circuit Court of Cook County in said cause, nor in the rendition of the decree therein, is there anything erroneous, vicious or defective, and that that record is no error, and in affirming the judgment and decree of the Circuit Court of Cook County in said cause and adjudging the same to stand in full force and effect notwithstanding the matters and things therein assigned for error, whereas the said Supreme Court of Illinois ought to have adjudged the contrary and reversed the said decree and judgment of said Circuit Court.

WHEREFORE and for divers other manifest errors appearing upon the face of said decree and judgment of said Supreme Court of the State of Illinois, the plaintiff in Error prays that the same may be reversed by this Court; and that this Court will make such order and decree in the case as may be meet.

JOHN M. PALMER,
Counsel for Plaintiff in Error.

146 U.S. 153

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146 U.S. 153

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1891.

EDWARD ROBY

vs.

CHARLES W. COLEHOUR ET AL.

Four Cases Numbered 1466, 1467, 1468, 1469,
AT LAST TERM.

ERROR TO SUPREME COURT OF ILLINOIS.

MOTION

Is hereby made for leave to cite, against the motion to dismiss for want of jurisdiction or affirm, new authorities in this court and in the Supreme Court of Illinois, published since May 2, 1892, (the day the motion to dismiss was taken in this court) suggesting the points to which they apply with additional authorities;

Also to present a printed copy of the sections of the Statute of Frauds of Illinois, cited in the brief filed, and in the pleadings, but inadvertently omitted in printing the brief.

JOHN M. PALMER,
Counsel for Plaintiff in Error.

SUGGESTIONS AND CITATION OF AUTHORITIES.

By JOHN M. PALMER,
Counsel for Plaintiff in Error.

August 2, 1892, advance sheets of the 138th Illinois Reports were issued, containing a case which seems *a clear confession* (or decision) *of error on vital federal questions* in the case at bar, namely: *Foraast* v. *Hyman*, 138 Ill., 423,pp. 426–7.

(We annex hereto a copy of that case.)

The Supreme Court of Illinois determined in the case at bar that Charles W. Colehour could sue on his claim under the power of attorney dated May 29, 1873, and on his claims as tenant in common under trust of 1873, notwithstanding his assignment in Bankruptcy, of August 30, 1878, (See certificate of said court printed in our brief, p. 66). *Foraast* v. *Hyman* decides that all his claims passed to his assignee in bankruptcy; and sustains our 5th and 6th assignments of error printed in our brief at pages 67–9.

(2.) *Foraast* v. *Hyman* sustains the point made on page 27 of our brief, that whatever interest C. W. Colehour had August 30, 1878, passed to his assignee; also the point made in full on page 29 that C. W. Colehour had no claim to sue upon.

(3.) Also the point made on page 51 that all his claims became the property of his assignee in bankruptcy, and are still the property of that assignee or the person to whom that assignee sold them.

(4.) Also the point made on page 52 that C. W. Colehour's interest in the land existing prior to his bankruptcy having been sold on a judgment against him (C. W. Colehour) the right of redemption was vested in his assignee in bankruptcy, or in the person to whom the assignee had sold it, (U. S. Revised Statutes, Sec. 5,046,) and *neither Colehour had any claim upon that judgment*

title when Roby bought it, or at any time since. (*Foraast* v. *Hyman*, 138 Ill., at pages 426–7, is *directly in point* in support of this position.)

(5.) *Foraast* v. *Hyman sustains the point* made on pages 57–8 of our brief: that, to the bill of Charles W. Colehour "the averment and proof of his petition and ad- "judication, etc., in bankruptcy, is a complete defense, "for it shows that the assignee in bankruptcy owns the "half Charles is suing for, and Charles Colehour has no "interest whatever in it."

Foraast v. Hyman *demonstrates* that, in the cases here at bar, the Illinois Court took away Roby's title by an erroneous repudiation of the effect of Section 5046 of the United States Revised Statutes, *title* Bankruptcy; and that the decisions now before this court could not have been made without annulling that section.

August 2, 1892, was also published in the same advance sheets the case of *Harding* v. *Durand*, 138 Ill., 515.

This case sustains the point made in our brief in many forms that:

The assignment and discharge in Bankruptcy of Roby being set up in his answer and proved, and the assignment in Bankruptcy, etc., of C. W. Colehour being set up in Roby's answer, and proved—either fact constituted a complete bar to C. W. Colehour's bill; and that if Colehour intended to rely on any grounds of exception which prevent the bar of the statute in favor of Roby, or any new promise or other fact reviving Roby's original obligation, or any acquisition of claim or title by C. W. Colehour after his petition in bankruptcy, *he was bound to amend his bill, and allege such matters; and as this was not done, the bar of the statute must prevail.* (*Harding* v. *Durand*, 138 Ill., 515, p. 517.)

(We annex hereto a copy of this case.)

The case cites as authorities, 12 Ill., 441; 52 Ill., 299; 111 Ill., 315; 82 Virginia, 518; and with the cases of *Tarlton* v. *Vietes*, 1 Gilman, at pages 473–4, and *White* v. *Morrison*, 11 Ill., 361 (cited in our brief at pages 54 and 61) the case of Harding v. Durand shows that the law of Illinois is to-day as it was when stated in 11 Ill., at page 366:

"Special replications in chancery are now disused. A general replication *only puts in issue the truth* and sufficiency of the matters stated in the bill and answer. If it is necessary for a complainant to put in issue any fact on his part, *in avoidance of the matter set up by the defendant he must do it by proper charges in his bill.* He may in the original bill anticipate the defense that will be made, and allege any matter necessary to explain or avoid it, or, omitting all reference to the defense, he may, on the coming in of the answer, introduce the new matter into the case, by an amendment to the bill." Restated in Cushman v. Bonfield 139 Ill. ... issue Sept ...

The petition, adjudication and assignment in bankruptcy of C. W. Colehour, and the petition, adjudication, assignment in bankruptcy, and discharge of Roby, being alleged in Roby's answer, it appears that the bar of his answer was complete; because Colehour did not allege, (1) assignment back to him (Colehour) by his assignee in bankruptcy of his title and claim; (2) some fact avoiding the effect of the dissolution of partnership relations by the bankrupt law, and (3) some fact avoiding the effect of Roby's discharge.

All these things were necessary *to charge Roby with obligation to C. W. Colehour*, and there was no averment nor the slightest evidence of either.

The points made on pages 54 and 60–1 of our brief are thus sustained.

By the rules of pleading in Illinois, it was established that all Charles Colehour's claims had been assigned to his assignee in bankruptcy, and never revested in him; and that the partnership relations between Roby and the Colehours had been dissolved by the bankruptcy decrees; that Roby had been discharged by the law; and that no new act or promise had restored prior obligations or relations; and the decision of the state court necessarily was: that the bankrupt law did not divest Colehour of his claims or title; did not dissolve partnership relations; and did not discharge Roby.

In *Torrence* v. *Shedd*, 144 U. S., 527 (published July 1, 1892), this court said (p. 530–1): "The cause of action is the subject-matter of the controversy, and that "is for all the purposes of the suit *whatever the plaintiff* "*declares it to be in his pleadings*."

These words embrace a principle applicable to other cases than those in which the words were so used.

In our brief, the point has been suggested in many italic passages that the Illinois court could not, *upon the bill*, decree for Colehour and against Roby *without denying* that the property rights and claims held by C. W. Colehour in the years 1873 to 1878, were taken from him by his proceedings in bankruptcy; that Roby was discharged from obligations by his proceedings in bankruptcy; that joint interests and relations were severed by the proceedings in bankruptcy of both; that Roby was a stranger to the property and to all things connected with it for four years from the date of his petition in bankruptcy; that C. W. Colehour became and has always remained a stranger to that property from the date of his petition; that the trustee for the assignees in bankruptcy could not substitute an insolvent as trustee without notice to the assignee; and that Roby, as purchaser

from his assignee in bankruptcy, took a title as a stranger by virtue of the statute of bankruptcy.

All these are federal questions, decided against the claims set up under the federal law and proceedings in a court of the United States.

The points are so suggested in passages in our brief at pages 28, 29, 54, 55, 57-8, 60-1, 63; most of them italicized.

In *Foster* v. *Goddard*, 1 Black, 506, at page 518, this court said: in equity "a party can no more succeed upon "a case proved but not alleged, than upon a case alleged "but not proved;" citing many authorities; in *Grosholz* v. *Newman*, 21 Wal., p. 481, this court said at page 488: "the recovery must be had upon the case made by the "pleadings or not at all;" in *Harrison* v. *Nixon*, 9 Peters, 483, at page 503: "Every bill must contain in itself "sufficient matters of fact, per se, to maintain the case of "the plaintiff, so that the same may be put in issue by the "answer, and established by the proofs. The proofs "must be according to the allegations of the parties; and "if the proofs go to matters not within the allegations, "the court cannot judicially act upon them as a ground "for its decision, for the pleadings do not put them in "contestation." *Eyre* v. *Potter*, 15 How., p. 56, also shows how the case is limited to the ground taken by the bill. *The doctrine of these cases has been applied in all its strictness by the Supreme Court of Illinois. McKay* v. *Bissett*, 5 Gilm., 499, p. 505; *White* v. *Morrison*, 11 Ill., 361, p. 366; *Rowan* v. *Bowles*, 21 Ill., 17, pp. 19-20; *Ohling* v. *Luitjens*, 32 Ill., 23, p. 29; *Lloyd* v. *Karnes*, 45, Ill. 63, p. 70; *Carmichael* v. *Reed*, 45 Ill., 108; *Hall* v. *Towne*, 45 Ill., 493; *Kellogg* v. *Moore*, 97 Ill., 282, p. 287; *Gage* v. *Curtis*, 122 Ill., 520, p. 527; *Walker* v. *Ray*, 111 Ill., p. 321; *Bremer* v. *C. & C. C. & D. Co.*, 123 Ill., 104, p. 110; *Eberstein* v. *Willets*, 134 Ill., 101, p. 105; *Purdy* v. *Hall*, 134 Ill., 298, pp. 304-5; and many other cases.

In *Bremer* v. *C. & C. C. & D. Co.*, 123 Ill., at page 110, the court said: "Whether the proofs without re- "gard to pleadings, would warrant the decree rendered, "is a question not important to consider, as the "decision of it could not affect the conclusion to be "reached, the one way or the other, for nothing is

"better settled than that proofs without allegations are "just as unavailable as allegations without proofs. 1 "Daniells Ch. Pr., *434 and notes." In *Kellogg* v. *Moore*, 97 Ill., at page 287, the court deduced this rule from the object of written pleading and demonstrated that it is essential to the rights of every litigant, and to prevent injustice and oppression.

These rules of pleading, so rigidly applied in Illinois, make it evident that adjudication of the above federal questions was necessarily involved in the disposition of the case by the state court; and that the explicit and solemn certificate of federal question made by the Supreme Court of Illinois and entered of record (as printed in our brief at pages 64-67), only serves to declare that such adjudications against the effect of the Bankrupt Act were made intentionally and not by any inadvertence.

The effect of the bill, as answered, was to assert that Charles Colehour could, notwithstanding the bankrupt act, maintain his suit against Roby, upon contracts and rights acquired by him (Colehour) against Roby in 1873. *Eyre* v. *Potter*, 15 How., p. 56; *McKay* v. *Bissett*, 5 Gilm., pp. 504–5; *White* v. *Morrison*, 11 Ill., 366; *Rowan* v. *Bowles*, 21 Ill., p. 19; *Lloyd* v. *Karnes*, 45 Ill., pp. 69–70; *Kellogg* v. *Moore*, 97 Ill., pp. 286–7–8; *Bremer* v. *Calumet Co.*, 123 Ill, 104; *Purdy* v. *Hall*, 134 Ill., pp. 304–5.)

Therefore, without a certificate of federal question, the case would have come within the doctrine of *Kaukauna Co.* v. *Green Bay &c. Co.*, 142 U. S., 254., p. 269.

(This case, of Kaukauna Co. v. Green Bay Co., 142 U. S., 254, published in the report issued March 24, 1892, should have been cited in our brief at pages 11 and 12 to have made complete the argument there presented.)

Sparhawk v. *Yerkes*, 142 U. S., p. 14, cites and approves *Traer* v. *Clews*, 115 U. S., 528, in the point quoted from it in our brief at pages 38 and 59.

The equity of the case of *Sparhawk* v. *Yerkes*, 142 U. S., at page 14, supports the point made on page 41 of our brief. Roby by operation of the law was a free man, had been for twelve years free when Colehour asserted his claim by beginning suit in 1890, because the property had suddenly become valuable.

May 12, 1892, *Fisher* v. *Green*, 31 Northeastern Reporter, 172, was decided by the Supreme Court of Illinois. On page 174 it sustains the point made at pages 24, 25 and 29 of our brief, that the deed from Charles W. Colehour to William H. Colehour, dated September 22, 1876, (printed in our brief at page 24), which on its face appears to be only an indemnity for an indorsement of a note, was a mortgage only.

(This view, taken by Charles W. Colehour in his bill, was necessarily held in the decree, as shown in our brief at p. 56.)

June 17, 1892, *Burton* v. *Perry*, was decided by the Supreme Court of Illinois. It holds:

"It is well settled that a purchaser with notice may get a good title from a bona fide purchaser without notice of prior equities." 24 Chicago Legal News, 418 (31).

This principle with citation of authorities is given on page 62 of our brief to show that as Crane Brothers Manufacturing Co., plaintiffs in a judgment against William H. and Charles W. Colehour of Sept. 24, 1879, had no notice of any claim in Charles W. Colehour or of the deed of William H. to Charles W. Colehour, dated May 1, 1879, Roby as purchaser at the judgment sale took the title in William H. Colehour, which was sold on the judgment, free from Charles Colehour's secret claims and deed.

On pages 6 and 7 the principle or an analogy was applied because William H. Colehour, being trustee for Roby's assignee in bankruptcy for the entire lands and for more money than their value, his deed to an insolvent, absolutely worthless, attempting to substitute him as trustee, was absolutely void as to the assignee in bankruptcy who had no notice of that deed, and when Roby purchased from that assignee (also without notice of the deed or any attempt to change the trustee) he took the equitable title and rights which the assignee had, entirely free from that deed, attempting secretly to substitute the insolvent as trustee.

Please Note: That the copy of the Assignments of Error in the four cases, printed in our brief at pages 67–69, is a true copy of the assignment in each case, except that asterisks indicate where in three cases an additional name is found in the originals on file in this court.

Statute of Frauds, of Illinois.

(Embraced in the Revised Statutes of 1845 as amended in 1869.)

An Act to revise the law in relation to frauds and perjuries.

(Approved February 16, 1874. In force July 1, 1874.)

1. Writing—How Signed. Sec. 1. Be it enacted by the People of the State of Illinois, represented in the General Assembly, That no action shall be brought, whereby to charge any executor or administrator upon any special promise to answer any debt or damages out of his own estate, or whereby to charge the defendant upon any special promise to answer for the debt, default or miscarriage of another person, or to charge any person upon any agreement made upon consideration of marriage, or upon any agreement that is not to be performed within the space of one year from the making thereof, unless the promise or agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized. (R. S. 1845, p. 258, Sec. 1.)

2. Land—Writing—How Signed. Sec. 2. No action shall be brought to charge any person upon any contract for the sale of lands, tenements or hereditaments or any interest in or concerning them, for a longer term than one year, unless such contract or some memorandum or note thereof shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized in writing, signed by such party. This section shall not apply to sales upon execution or by any officer or person pursuant to a decree or order of any court of record in this state. (R. S. 1845, p. 258, Sec. 1; L. 1869, p. 363, Sec. 1.)

9. Trusts, etc., to be in Writing—Resulting Trusts. Sec. 9. All declarations or creations of trusts

or confidences of any lands, tenements or hereditaments, shall be manifested and proved by some writing signed by the party who is by law enabled to declare such trust, or by his last will in writing; or else they shall be utterly void and of no effect: *Provided*, that resulting trusts or trusts created by construction, implication or operation of law, need not be in writing, and the same may be proved by parol. (R. S. 1845, p. 259, Sec. 4.)

(From 138 Ill., 423.)

KNUD K. FORAAST

v.

DAVID HYMAN *et al.*

Filed at Ottawa October 31, 1891.

BANKRUPT—*right of redemption.* Upon an adjudication in bankruptcy, all the bankrupt's right of action for property, real or personal, and all his redemption rights as to real property, pass to his assignee in bankruptcy; and the bankrupt cannot thereafter assert any such right by bill to redeem, by bill to enforce a trust, or for specific performance.

APPEAL from the Appellate court for the First district;—heard in that court on appeal from the Circuit court of Cook county; the Hon. LORIN C. COLLINS, judge, presiding.

Messrs. DALE & FRANCIS, and Mr. F. W. BECKER, for the appellant:

Appellant's rights were not such as passed to his assignee in bankruptcy. *Hatch* v. *Wagner*, 15 Ill., 127; *Elder* v. *Jones*, 85 *id.*, 384; Perry on Trusts, sec. 234; *Bowman* v. *People*, 82 Ill., 246; *Baker* v. *Copenbarger*, 15 *id.*, 103; *Merry* v. *Bostwick*, 13 *id.*, 398; *Nicholson* v. *Walker*, 4 Bradw., 404; *Gilman* v. *Bell*, 99 Ill., 144; *Robinson* v. *Denny*, 57 Ala., 492; *In re Benson*, 8 Biss., 116.

Mr. HOWARD HENDERSON, for the appellee Bertha Schniber:

Whatever rights appellant had in the lot passed to his assignee. *Spindle* v. *Shreve*, 111 U. S., 512; *McNab* v. *Heald*, 41 Ill., 326; *Holbrook* v. *Coney*, 25 *id.*, 543; *Jewett* v. *Preston*, 27 Me., 400; *Robinson* v. *Denny*, 57 Ala., 492.

Mr. JUSTICE CRAIG delivered the opinion of the court:

This was a bill in equity, brought by Knud K. Foraast, to enforce the specific performance of a parol agreement in reference to a certain lot in Chicago. It is alleged in the bill that in September, 1874, complainant owned, in fee simple, a certain lot in Chicago, subject to a $1,600 incumbrance; that he was indebted to defendant Hyman in the sum of $400 and over, and being unable to meet the indebtedness without a sacrifice, he consulted with Hyman, stating freely his situation; that Hyman, after full consultation, proposed that defendant should execute

to him his judgment note for his entire indebtedness; that judgment, execution sale and purchase by Hyman of the lot should take place; that at the foreclosure sale of the $1,600 incumbrance Hyman would purchase, and would, as a favor to complainant, hold the title, subject to redemption by complainant, whenever, if ever, he should be able to redeem the same, upon payment of the said indebtedness and the amount expended, with interest, provided complainant and his wife would quitclaim to Hyman said lot; that it was further agreed that complainant should retain possession of said lot, and Hyman should collect the rents from the improvements thereon, giving complainant credit for any balance remaining after payment of taxes, insurance and repairs; that this proposition was accepted by complainant; that a judgment note was executed, judgment entered thereon for $515, and, at an execution sale of said lot, the purchase thereof was made by Hyman; that at the foreclosure sale of the $1,600 incumbrance Hyman became the purchaser; that complainant and wife quitclaimed the lot to Hyman; that Hyman collected the rents for six years and five months, amounting to $3,850; that the lot was worth, at a low estimate, $5,000 at the time of conveyance; that Hyman paid nothing therefor, and that the only consideration which moved complainant was the faith that complainant had that Hyman would, as agreed, after acquiring title, hold it as a trustee for complainant, with the right in complainant personally to have a reconveyance, upon compliance, whenever he should be able, with the terms of said contract; that in 1887 Hyman conveyed the lot to one Schniber, but the purchaser took the conveyance with notice of Hyman's agreement with complainant. It is also alleged that in 1876 complainant was adjudged a bankrupt, and his assignee in bankruptcy undertook to sell his equity in said lot to one Bowen, who filed a bill against Hyman in the Superior court of Cook county to redeem under the terms of said agreement, which bill was dismissed; that his assignee in bankruptcy acquired no title to said lot; that the undertaking of Hyman was only a grant, personally, to complainant; that complainant was discharged in bankruptcy in 1876; that he has never, up to the present time, been financially able to undertake to

compel Hyman to do what he agreed; that he is now ready and willing to pay Hyman any balance found due on an accounting. The bill prays that the agreement may be established for an accounting and a reconveyance of the property. A general demurrer was interposed to the bill, which the court sustained, and a decree was rendered dismissing the bill for want of equity. That decree was affirmed in the Appellate court.

Section 5046 of the Bankrupt act provides, that "all the property conveyed by the bankrupt in fraud of his creditors, all rights in equity, choses in action, patent rights and copy-rights, all debts due him, * * * and all his rights of action for property or estate, real or personal, and for any cause of action which he had against any person arising from contract, * * * and all his rights of redeeming such property or estate, together with the like right, title, power and authority to sell, manage, dispose of, sue for and recover or defend the same, as the bankrupt might have had if no assignment had been made, shall * * * be at once vested in such assignee."

The complainant having been adjudged a bankrupt in 1876, while the contract entered into between him and Hyman was in full force, the question presented by the record is, whether his interest in the property, whatever it may have been, did not pass, under the section of the statute *supra*, to his assignee. If the complainant's right, title or interest in and to the property passed to his assignee, then it is plain, disregarding all other questions, he cannot maintain this bill.

Recurring to the case made by the bill, it will be found that the complainant's right to a decree rests upon a parol agreement made with Hyman, by the terms of which complainant had the right to redeem the property and obtain a reconveyance, upon the payment of certain advances Hyman had made in acquiring the title. Now, whether complainant's cause of action may be termed a bill to redeem or a bill for specific performance, or a bill to enforce a trust, is a matter of no moment. According to complainant's statement in the bill, when he was adjudged a bankrupt he had, in equity, a right of action to obtain the title to the property in question upon the payment of certain advances made by Hyman, and under the

express terms of the statute all his rights of action for property, real or personal, and all his redemption rights as to any real property, passed to his assignee.

It is claimed in the argument that the equity of redemption claimed under the Hyman agreement was an equity belonging to complainant alone, dependent upon his own ability, conferred upon him as a personal favor, and therefore wholly personal. We do not regard this position tenable. If complainant had, under the contract, the right to redeem the land upon the payment of a certain sum of money, that right conferred upon him an equitable interest in the property, which, upon his death, would descend to his heirs. He could, in equity, convey it by deed, and no reason is perceived, under the broad provisions of the statute of the United States heretofore cited, why it would not pass to his assignee in bankruptcy. The fact that complainant had not, when he was adjudged a bankrupt, tendered the amount Hyman had advanced on the land, does not affect the question. His assignee, after he was adjudged a bankrupt, stood in his shoes, and possessed all and the same rights in regard to this land that he possessed.

We think it is plain that all right, title or interest which complainant had in regard to the property passed to his assignee, and he had no right whatever to maintain a bill.

The judgment of the Appellate court will be affirmed.

Judgment affirmed.

(From 138 Ill., 515.)

GEORGE F. HARDING

vs.

HENRY S. DURAND.

Filed at Ottawa October 31, 1891.

1. STATUTE OF LIMITATIONS—*equitable remedy, when barred—mortgage foreclosure.* Where there is a legal and an equitable remedy in respect to the same subject matter, the latter is under the control of the same statutory bar as the former. If, therefore, an action at law on a note would be barred by the statute, a bill to foreclose a mortgage given to secure the same will also be barred.

2. SAME—*construed—notes executed within or without the State.* The first section of the act of 1849, limiting actions upon promissory notes, etc., to sixteen years after the cause of action has accrued, applies to notes executed within or without the State, alike.

3. EVIDENCE—*in avoidance of Statute of Limitations—allegations in the bill.* On a bill to foreclose a mortgage, to which the Statute of Limitations is interposed as a defense, the complainant can not give in evidence a new promise or evidence of the absence of the mortgagor from the State in avoidance of the bar, unless such matter of avoidance is alleged in the bill.

4. CHANCERY PLEADING—*avoidance of bar of Statute of Limitations.* The rule in chancery cases, where the Statute of Limitations is interposed as a defense, and it is intended by the complainant to rely upon grounds of exception which prevent the bar of the statute, is to allege those grounds in the bill. This may be done by an amendment to the bill.

APPEAL from the Appellate Court for the Second District;—heard in that court on appeal from the Circuit Court of Winnebago county; the Hon. WILLIAM BROWN, Judge, presiding.

Mr. WILLIAM J. AMMEN, for the appellant:

As to *laches*, see *Howe* v. *South Park Comrs.* 119 Ill. 101; *Carpenter* v. *Carpenter*, 70 id. 557; *McDonald* v. *Stow*, 109 id. 45; *Castner* v. *Walrod*, 83 id. 171; *Whipple* v. *Whipple*, 109 id. 424; *Hoyt* v. *Institution*, 110 id. 390; *McHany* v. *Schenk*, 88 id. 357.

Mr. CHARLES A. WORKS, for the appellee:

The Statute of Limitations which bars the debt can alone bar the mortgage. *Medley* v. *Elliott*, 62 Ill. 532; *Hagan* v. *Parsons*, 67 id. 170.

Mr. JUSTICE SCHOLFIELD delivered the opinion of the Court:

Bills were filed in the circuit court to foreclose two mortgages, and by an order of the court, made after the filing of the bills and before hearing, the suits were consolidated. The mortgages were made to secure the payment, each, of a promissory note for $2,000, with interest at ten per cent per annum from date. The mortgages and notes were made in Wisconsin, where the parties then resided, but the lands included in the mortgage are in Winnebago county, in this State. The notes matured on the 15th of February, 1860. The bills were not filed nor summons served until in 1878.

Among the defenses set up and relied upon in the answer is that of the Statute of Limitations. The rule is, where there is a legal and an equitable remedy in respect to the same subject matter, the latter is under the control of the same statutory bar as the former. (*Quayle* v. *Guild*, 91 Ill. 378; *Hancock* v. *Harper*, 86 id. 445; *Carter* v. *Tice*, 120 id. 277.) If, therefore, an action at law on these notes would be barred, these bills to foreclose are barred.

The statute controlling is the first section of the act of November 5, 1849, which provides that "all actions founded upon any promissory note * * * made * * * after the passage of this act, shall be commenced within sixteen years after the cause of action accrued, and not thereafter." (Gross' Stat. of 1869, p. 430.) This applies to promissory notes executed within or without the State, alike, and bars them after the expiration of sixteen years, which period had here expired on the 15th day of February, 1876,—more than a year before the bills were filed. Counsel for appellee, however, claims that there should be deducted from this, periods of absence from the State, and he also *relies upon a subseqent acknowledgment of the debt*, within sixteen years. But there are no allegations in the bills under which proof in either of these respects is admissible. The rule in chancery, where the Statute of Limitations is interposed as a defense, and it is intended by the complainant to rely upon grounds of exception which prevent the bar of the statute, is to allege those grounds in the bill. This may be done, under our statute, by an amendment to the bill; but unless it is done either in the original

bill or by an amendment thereto, the bar of the statute must prevail. *School Trustees* v. *Wright*, 12 Ill. 441; *Henry County* v. *Winnebago Drainage Co.* 52 id. 209; *Walker* v. *Ray*, 111 id. 315; *Switzer* v. *Noffsinger*, 82 Va. 518

The judgment of the Appellate Court and the decree of the circuit court are reversed, and the cause is remanded to the circuit court for further proceedings consistent with this opinion.

Judgment reversed.